(16,069.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 779.

WILLIAM GRAVER, APPELLANT,

vs.

BENJAMIN C. FAUROT.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 19, 1895.

1 In the Circuit Court of Appeals for the Seventh Judicial Circuit, October Term, 1894.

Present: Hon. William A. Woods, circuit judge, and Hon. John J. Baker, district judge.

Certificate to the Supreme Court.

WILLIAM GRAVER, Appellant,
v.
BENJAMIN C. FAUROT, Appellee.

This cause came on for hearing upon appeal from the circuit court of the United States for the northern district of Illinois, and, having been argued and submitted for decision, a certain question and proposition of law is found to be involved in the appeal, concerning which question and proposition the instructions of the Supreme Court of the United States *is* desired.

Now, therefore, on this 29th day of May, 1895, it is ordered that the accompanying statement of facts and the following question be certified to the Supreme Court of the United States for its opinion and instruction, to wit:

2 *Statement of Facts.*

The appellant, William Graver, brought suit in the superior court of the county of Cook, in the State of Illinois (which suit was duly and properly removed into the circuit court of the United States for the northern district of Illinois), to impeach for fraud a decree in equity rendered by the superior court of the county of Cook, in the State of Illinois, on the 6th day of July, 1889, in a certain suit therein depending, wherein William Graver, the appellant here, was complainant and Benjamin C. Faurot, the appellee here, and one A. O. Bailey were defendants, which decree dismissed the complainant's bill for want of equity. The bill in this suit is in these words:

To the honorable the judges of the superior court of Cook county, in chancery sitting:

William Graver, of the city of Chicago and State of Illinois, presents this his bill of complaint against Benjamin C. Faurot, a citizen of the city of Lima, in the State of Ohio, and Andrew O. Bailey, at one time a citizen of Ohio but at the present time residence unknown, and respectfully represents that on the 18th day of Sept., 1888, the complainant filed his original bill in the superior court of Cook county, in chancery, alleging in such bill as follows:

Superior Court of Cook County. In Chancery.

To the honorable judges of said court, in chancery sitting:

3 Your orator, William Graver, of the city of Chicago, brings this his bill in chancery against Benjamin C. Faurot, a resident of the city of Lima, in the State of Ohio, and Andrew O. Bailey, at one time a resident of Lima and at the present time having no particular residence.

Alleges as follows:

First. That on or about the first of June, A. D. 1887, he was engaged in a small manufacturing business at Lima, in the State of Ohio, and was not then worth over the sum of fifteen thousand ($15,000) dollars; that at that time one Benjamin C. Faurot was the president of the Lima National bank, with which complainant was then doing business, and knew all about the property and responsibility of complainant, and complainant could not before that time have borrowed from said bank over one thousand ($1,000) dollars.

Second. That A. O. Bailey then resided in said town of Lima and was then the president of the Chicago Edwards Oil Burner & Manufacturing Company, a corporation organized under the laws of the State of Illinois, and was then a friend and intimate acquaintance of the said Faurot.

Third. That the said Bailey pretended at that time to be a sincere friend of complainant and represented to him that the stock of said company was very valuable; that P. Rockefeller & F. B. Squires, of the Standard Oil Company, were interested in said company and were in a position to greatly advance the in-

4 terests of said company; that its stock was well worth dollar for dollar and was a good purchase at that, but as a particular favor to complainant he thought he could induce the said company to let him have five hundred (500) shares at sixty ($60.00) dollars per share, which would be twenty thousand ($20,000) dollars less than the same was really worth, but would have to see and consult with the directors of said company and get their consent, and that complainant, believing said Bailey's professed friendship for him, told him to see what he could do.

That said Bailey went away, and in a few days returned to complainant and told him that as an especial favor said company had consented to sell the complainant said five hundred shares at fifty ($50.00) dollars a share; that the same was well worth par and would soon be above par, and that complainant, believing all of said representations and that the said five hundred (500) shares of stock belonged to said company and that the money to be received therefor would be used for the benefit of said company, agreed then and there to take said five hundred shares for said sum of thirty thousand ($30,000) dollars.

That said Bailey then pretended that he had received said stock from the said company and had power to sell it.

Fourth. Complainant alleges and states the fact to be that said company had not owned and did not then own said stock and had then no interest in it.

That instead of going to the directors of said company to
5 get their consent to the sale of said stock said Bailey went to Toledo, and then and there bought of one E. A. Edwards the said five hundred shares of stock for the sum of three dollars and fifty cents ($3.50) per share and gave his note for the same, the said Bailey then agreeing to procure said Faurot to discount the same; that said Bailey went with said Edwards, as complainant is informed and believes, to said Faurot, who discounted said Bailey's notes and paid the avails of the same to said Edwards; that said Bailey then returned with said stock to complainant and transferred the same to him, complainant then having full faith and confidence in said representations of said Bailey and then believing said stock to be worth par, and that complainant then and there made, executed, and delivered to said Bailey two judgment notes for ten thousand ($10,000) dollars each, and has two judgment notes for five thousand ($5,000) dollars each, making the full sum of thirty thousand ($30,000) dollars, when complainant says that said stock was worthless and so known to be by the said Bailey.

That as a part of the said transaction the said Bailey at the time of the delivery of the notes to him positively promised to hold the same in his own possession and not to indorse and transfer said notes, and that complainant should not be called upon to pay them until he should be able to realize on said stock or a part of the same.

Fifth. That the complainant is informed and believes that at the time of said transactions said Bailey and Faurot were interested
6 together in the defrauding and swindling of complainant, and that before said Faurot cashed the said notes of said Bailey and received the said notes of complainant the same had been arranged between said Bailey and said Faurot, and that said Faurot never paid the said Bailey anything on said notes of complainant, but held the same for security for the said notes of said Bailey, with an agreement to divide with said Bailey whatever might be realized on complainant's notes.

Sixth. That before complainant had ascertained the facts of this case and before he had learned the worthlessness of this stock he had paid on said notes the sum of ten thousand ($10,000) dollars in cash and five thousand ($5,000) dollars in real estate, besides interest to the amount of about twenty-eight hundred ($2,800.00) dollars, and that said Faurot now holds said assigned original notes and notes given in renewal of the same to the amount of fifteen thousand ($15,000) dollars, five thousand ($5,000) of which is now due and ten thousand ($10,000) dollars of which has not yet matured, and that if said notes not matured should be transferred to a *bona fide* purchaser without notice of the matters hereinabove stated they might be recovered againt complainant.

Seventh. That complainant has offered the said Bailey and the said Faurot to surrender and deliver up to them the said stock and demanded of them to surrender to him of said notes and moneys he has paid on account of the same, and that said demand has been refused; that, as complainant verily believes, the said Bailey
7 and Faurot have combined and confederated together for the purpose of swindling and defrauding complainant.

Eig[illegible] That complainant has commenced a suit on the law side of this honorable court against the said Bailey and Faurot to recover the damages he has sustained in the premises, but that, as complainant is informed and believes, neither the said Bailey nor Faurot nor both are worth the full amount of the damages he might recover in said cause, and that if said Faurot is not enjoined from indorsing and disposing of said unmatured notes complainant greatly fears that he will indorse and transfer them to a *bona fide* purchaser, who could collect them of this complainant; that irreparable injury will be done to complainant unless an injunction immediately issue without notice to defendants. Wherefore, and inasmuch as complainant is remediless in the premises when and by the strict rules of the common law and can only obtain adequate relief in a court of equity, where matters of this nature are properly cognizable and relievable, complainant prays and praying—

First. That the said Faurot may be enjoined from indorsing, selling, or disposing of said unmatured notes, and that on final hearing said injunction may be made perpetual.

Second. That said notes now held by the said Faurot may be ordered to be surrendered up and cancelled.

Third. That complainant may have such further and other relief in the premises as shall be agreeable to equity and good conscience.

8 May it please your honors to grant unto complainant a writ of injunction to be directed to said Faurot, his agents and attorneys, restraining him and them from selling and disposing of said unmatured notes to any other person or persons, and also to grant to complainant the writ of summons in chancery, directed to the sheriff of Cook county, commanding them, the said A. O. Bailey and the said Benjamin C. Faurot, to appear before said court, on the first day of the next term thereof, at Chicago, in said county of Cook, and then and there answer this bill; and complainant will ever pray, etc.

WILLIAM GRAVER.

MONROE & McSHANE,
Complainant's Solicitors.
H. S. MONROE, *Of Counsel.*

Sworn; usual jurat.

Your orator would further show to your honor that afterwards and on the 20th day of October, 1888, the said Benjamin C. Faurot entered his appearance to the said bill and filed his sworn answer thereto; which answer set up as follows:

STATE OF ILLINOIS:

In the Superior Court of Cook County.

WILLIAM GRAVER
vs.
BENJ. C. FAUROT and A. C. BAILEY. } Bill.

The answer of Benjamin C. Faurot, one of the defendants in the above-entitled cause.

This defendant, now and at all times hereafter reserving
9 and saving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and imperfections in the complainant's said bill contained, for answer thereto or to so much thereof as he is advised it is material or necessary for him to make answer unto, saith:

First. That he resides in Lima, in the State of Ohio.

Second. That he knows the plaintiff as an individual, but never has known nor does know "all about his property or responsibility."

Third. That this defendant for a number of years has known the defendant A. O. Bailey, but has no friendship or intimacy with him except such as is usual between business men and their business acquaintances.

Fourth. That this defendant knows nothing of what representations or promises, if any, were made by said Bailey to complainant touching the matters stated in said bill or any of them, nor does this defendant know what, if anything, said Bailey knew about the amount of money complainant had at said time or now.

Fifth. That this defendant has no knowledge of the price paid or where or from whom said Bailey procured the stock alleged in said bill to have been sold by said Bailey to said complainant.

Sixth. He denies that he discounted note or notes given by said Bailey for the shares of stock mentioned in said bill, or that
10 this defendant "paid the avails" of any such note or notes to E. A. Edwards, as alleged in said bill.

Seventh. This defendant denies that he was interested or is interested or that he agreed to be interested in any manner, directly or indirectly, in the stock transaction or the proceeds of the stock transaction narrated in said bill between said Bailey and the said complainant.

Eighth. That all this defendant knows of the matters and transactions stated in the bill is that said Bailey, being a depositor in the Lima National bank, in the State of Ohio (of which bank this defendant was and is the president), applied to said bank in the ordinary course of business to get the notes of the said complainant mentioned in said bill discounted, offering in addition to said Bailey's own endorsement and guaranty as collateral security the five hundred shares of stock referred to in said bill; that the financial committee of said bank, relying on the supposed integrity and financial responsibility of the complainant and said Bailey and believing said stock to be worth $60 or $70 per share, directed

the said discount to be and the same was made in the ordinary and usual course of business of said bank; that afterwards the complainant paid the first ten thousand dollars due on said notes, and when the second ten-thousand-dollar note became due he applied to said bank for an extension thereof and to have the amount divided into two notes of five thousand dollars each, which was granted him, and he executed to said bank two new notes
11 of five thousand dollars each therefor due at different times.

When the first of said $5,000 notes became due, complainant paid it; when the second of said $5,000 notes became due, the complainant asked of said bank a further extension and to have it split into two notes of $2,500 each, payable in thirty and sixty days from their date, which was done. About the time the first of these $2,500 notes was coming due, complainant met this defendant and asked him for an extension of said $2,500 notes of thirty and sixty days more, which this defendant, still believing in the financial responsibility and good faith of the complainant, promised him he should have; but when the matter was laid before the financial committee of the said bank, it declined to grant the desired extension; and thereupon this defendant, being a man of large means and feeling kindly toward the complainant, stated to the committee that he had given his promise to the complainant that he should have said extension and he proposed to keep his word, and that if the bank would assign said $2,500 notes to this defendant that he would give the bank the amount due thereon, which was done, and this defendant is now the owner and holder of the said $2,500 notes, which are all he holds or owns of the paper mentioned in said bill.

Ninth. That this defendant is not advised what offers of surrender of stock or demands for the delivery of said notes or for the money paid on them may have been made to or upon said Bailey by the complainant, but this defendant denies that any such offers or demands have been made to or upon this defendant.

12 This defendant, further answering, says that he is worth at least five hundred thousand dollars over and above all his debts and liabilities, which fact, he is informed and believes, the complainant well knew at and long before the time he filed his said bill.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged; without this, that there is any other matter, cause, or thing in said complainant's bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is true to the knowledge or belief of this defendant; all of which matters and things this defendant is willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

BENJ. C. FAUROT,
E. A. SHERBURNE,
Solicitors for Defendants.

STATE OF OHIO, }
County of Allen, } ss:

Benjamin C. Faurot, being first duly sworn, says that he is one of the defendants in the above-entitled cause; that he has read and subscribed to the above and foregoing answer and knows the contents thereof, and the same is true of his own knowledge except as to those matters and things therein stated on information and belief, and as to those he verily believes it to be true.

B. C. FAUROT.

13 Subscribed and sworn to before me this 18th day of October, A. D. 1888, and — certify that I am authorized by the laws of the State of Ohio to administer oaths.

D. J. CABER,

[SEAL.] *Notary Public, Allen County, Ohio.*

And the said A. O. Bailey filed his sworn answer to the said bill on the 31st of October, 1888, of which the following is a copy:

"This defendant, for answer to said bill or to so much thereof as he is advised that it is necessary or material for him to answer unto, says:

First. He admits that at the time mentioned in said bill he was and is acquainted with and on friendly terms with said codefendant, Faurot, but he denies that he was any more friendly or intimate with him than is usual between ordinary business acquaintances.

Second. He denies that at that time or any other he made any pretensions of any friendship for said complainant; denies that he represented to said complainant that said stock was well worth "dollar for dollar;" denies that he represented to the complainant that as a particular favor he thought he would induce said Chicago Edwards Oil Burner & Manufacturing Company to let complainant have 500 (or any other number) of shares of the stock of said company at sixty ($60) dollars per share, or that price would be twenty — ($20,000) dollars less than it was reasonably worth.

14 Denies that this defendant represented to complainant that he would have to see and consult with the directors of said company or get their consent.

Denies that afterwards this defendant returned and represented to complainant that, as an especial favor, said company had consented to sell complainant said 500 shares at sixty ($60.00) dollars per share; denies that he represented or did anything to induce complainant to believe that said shares belonged to said company, or that the money to be received therefor from complainant was for the benefit of said company; denies that he pretended to the said complainant that he, this defendant, had received said stock from said company; denies that, as for any conversation with complainant, this defendant went to E. A. Edwards and bought said 500 shares of stock, or that he then gave his notes therefor, agreeing to procure said Faurot to discount them; denies that he then went with said Edwards to said Faurot, or that the latter discounted this

defendant's notes and paid the avails thereof to said Edwards, or that this defendant then returned with said stock to and transferred it to the complainant.

Denies that he then knew that said stock was worthless, and denies that it was worthless; denies that he at the time of the delivery of said notes made by complainant to this defendant (or at any time) *he* promised to hold the same in his possession and not indorse or transfer said notes, or that said complainant should not be called upon to pay them until he should be able to realize
15 on said stock or a part of the same; denies that this defendant and said Faurot were interested together in said transaction or in defrauding or swindling or attempting to defraud or swindle complainant; denies that any agreement was made between said Faurot and this defendant to divide whatever might be realized on complainant's notes.

This defendant, further answering, says that the facts in regard to said transaction are that for a month or two prior to January 25th, 1887, this defendant had been negotiating with said E. A. Edwards about purchasing 1,000 shares of said stock; that on the said 25th of January, 1887, this defendant did buy of said Edwards 1,000 shares of said stock; but this defendant did not buy said stock or any of it with a view or expectation of selling the same or any part thereof to the complainant, nor did he have any conversations or negotiations with complainant about selling him any of said stock until on or after June 1st, 1887; that this defendant's reasons for buying said stock were, first, in order to obtain control of said company, whose entire capital stock was 5,000 shares; second, because he believed said stock to be a good paying investment; that at the time this defendant purchased said 1,000 shares he already owned 1,800 shares of stock of said company. This defendant verily believes said stock to be worth the price paid by complainant when he purchased it, and it has since been sold to others for more.

This defendant did not offer to sell said complainant 500
16 but only 100 shares, but complainant insisted on having 500 shares, and thereupon this defendant told him he would see if he could let him have them, and did delay a little before deciding to let complainant have said 500 shares, simply doing so, however, to give him (this defendant) an opportunity to inform himself about the financial responsibility of said complainant, and, so far — compromising said complainant not to discount or transfer said notes, this defendant avers that complainant well knew when they were discounted and where and by whom, and they were so discounted in said Lima, Ohio, where complainant was doing business, and he made no objection nor complaint, but, on the contrary, paid the first ten thousand ($10,000) dollars notes when they became due, and renewed the next, as stated in the answer of Benjamin C. Faurot, already filed in this case.

This defendant denies that he agreed or promised that said complainant should not be called on to pay said notes until he should be able to realize in said stock or a part thereof; denies that there was any agreement other than that expressed in the notes themselves;

and this defendant, further answering, denies that Benjamin C. Faurot had, or that it was agreed or understood that he should have, any interest, direct or indirect, in the profits or proceeds, if any, of the stock transaction between this defendant and complainant recounted in said bill.

And this defendant denies all and all manner of fraud and all and all manner of combination and confederacy wherewith
17 he is by the said bill charged; without this, that there is any other matter, cause, or thing in the said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and prays to be hence dismissed with his costs and damages.

A. O. BAILEY.

Usual jurat.

Your orator would further show unto your honors that at the time of filing said bill, or immediately thereafter, a preliminary injunction was granted to your orator, enjoining the said Faurot and Bailey according to the prayer of your complainant's bill.

Your orator would further show unto your honor that afterwards, to wit, on the — day of ——, on a motion to dissolve said injunction, the said motion was heard upon the bill and answer aforesaid and no other testimony, and the court did order and decree that said motion be granted, and said injunction was accordingly dissolved.

Your orator would further show unto your honor that at the hearing of said motion to dissolve said injunction this honorable court ruled that the matters and things set up in said bill of
18 complaint furnished a good defense at law to any suits that might be brought by either or both of the said defendants against said plaintiff, and that as it appeared from the said answers that said defendant, Faurot, was a man worth at least $500,000, clear of all debts and responsibilities, that the complainant had a full and perfect remedy at law against said defendants.

Your orator would further show unto your honor that at the time of filing his said bill he was absolutely certain that as to the matters and things set forth in said bill that they were true and well knew that by reason of the premises he had been grievously wronged and defrauded out of a very large sum of money.

Your orator would further show unto your honor that all the matters set forth in said bill tending to establish the fraud and iniquity of the said defendants were matters that must necessarily in a great measure lie wholly within the knowledge of said defendants, and that the said wrong being that of conspiracy to cheat and defraud your orator by said defendants that the material evidence necessary to establish said defendants' fraud and conspiracy must of necessity be and was wholly within the knowledge and under the control of

said respondents, and that your orator was wholly ignorant of the facts that he could obtain any witness or witnesses or any document or documents which would tend to establish the fraud complained on in his said bill or to disprove the statements made in said respective answers made and filed by the said Faurot and the said Bailey, and was for that reason wholly unable to support by legal and competent proof the allegations of his said bill, although he, regardless of expense, made every effort to obtain such evidence.

19

Your orator would further show that it was solely by reason of the suppression of testimony on the part of said respondents and by absolute falsehood and perjury on their part in the allegations contained in their respective answers that said bill was dismissed for want of equity, and that the complainant was not able to obtain competent evidence to establish the allegations of his said bill.

Your orator would further show to your honor that by reason of the premises and the dissolution of said injunction for the reasons aforesaid your orator was informed by his solicitors and believed that it was not necessary for your orator to pay any further attention to the said case in court, unless he was able to obtain some competent evidence tending to establish the matters and things set up in his said bill and sufficient to overthrow the sworn answers of said respondents, and that for these reasons and that for the reasons that he was instructed that he had an adequate remedy at law, and therefore he was wholly remediless in a court of chancery.

Your orator would further show unto your honor that at the time of filing his said bill he had commenced a suit, as is alleged in his said bill, counting on the false representations and conspiracy and fraud of these said respondents, which said suit is now pending undetermined.

20

Your orator would further show unto your honor that after said injunction has been dissolved the said defendants, without notice to said complainant and upon their motion, caused said bill to be dismissed on the 8th day of July, 1889, and caused a decree to be entered in words and figures, to wit:

"July 8, 1889.—This case coming on to be heard, came the parties hereto, by their solicitors, respectively, and the court, having heard the evidence, arguments of counsel, and being fully advised in the premises, finds *that* the equities of this case to be with the defendants; therefore it was ordered that this case be, and the same is hereby, dismissed at the complainant's costs for want of equity, and that the defendants have of the said plaintiff their costs in the premises."

Your orator would show your honor that neither the complainant nor his solicitor were present at the hearing of said cause, if any were had; and your orator is further informed and believes, and so charges the fact to be, that no evidence was heard in said cause at the final hearing thereof or argument made by counsel so far as complainant is concerned, but that the said matter was disposed of *ex parte* and without notice as aforesaid.

Your orator would further show unto your honor that at the May

term, 1891, the said Benjamin C. Faurot commenced an action against said complainant in the United States circuit court of the northern district of Illinois upon two promissory notes of $5,000 each, dated Lima, June 27, 1888, and payable four months
21 after date, payable to the order of the Lima National bank and payable at the said bank, together with 8% interest after maturity, and signed by your orator.

That the said two promis-ory notes sued on as aforesaid are renewals of the very same promis-ory notes mentioned in your orator's bill of complaint and which were given for this purchase of said 500 shares of stock in the Edwards Oil Burner Company in consequence of the perpetration of the fraud and deceit set up in said bill of complaint to said Bailey and for no other consideration, and that said Bailey became the possessor of said promis-ory notes by virtue of the fraud and guile practiced upon your orator as set up in said bill of complaint.

That in said suit in the United States court your orator, by his attorney thereto, filed special pleas to the declaration filed on the said promis-ory notes, setting up the failure of consideration and the fraud practiced upon him by the said Faurot and Bailey as set up in said bill of complaint.

That afterwards and on the — day of —— the said Faurot filed a replication to said pleas, in which he set up that your orator ought not to set up the matters and things pleaded in his said pleas, which were the matters of fraud set up in said bill as the defence to said promis-ory notes, for the reason that your orator's bill was filed in this honorable court; that said answers were filed thereto,
22 and that said decree was obtained, dismissing said bill of complaint for want of equity, and that the said decree was *res judicata* and estopped this defendant from making his defence at law upon the said promis-ory notes.

Your orator is further informed and believes that the said defendants, Faurot and Bailey, intend at the trial of the said action in the case wherein your orator is the plaintiff and said Faurot and Bailey are defendants, counting on the said fraud and deceit set up in said bill, to offer said decree in equity as an estoppel and as *res judicata* to the obtaining any judgment on behalf of said plaintiff in said action.

Your orator would further show unto your honor that the said case of the said Faurot against your orator now pending in said United States circuit court was set down and fixed for hearing on the 8th day of January, 1894, and that your orator, in his attempt to obtain witnesses for the purposes of establishing his said defense, which defense consisted in matters and things set up in his said bill of complaint and to which the plea of dismissal is pleaded as an estoppel, and to use said witnesses as evidence in the trial of said cause, discovered for the first time that he was able to establish the averments in his said bill, and that he was able to establish every material allegation in the answers filed by said defendants respectively, was clear and absolute perjury and false swearing; that de-

fendants well knew at the time they filed their said answers that every material fact set up in their said answers was untrue.

23 Your orator would show unto your honor that he has now discovered evidence, which he is now able to produce in court, that will show the truth of all matters and things set up in his said bill of complaint and the absolute falsity of all material matters and things responsive thereto set up in the respective answers of said respondents and upon which they obtained the dissolution of the injunction and the final decree dismissing the complainant's bill.

Your orator would further show unto your honor that this newly discovered evidence was obtained first by means of inquiries in reference to the condition of the affairs of the Lima National Bank of Lima, Ohio, of which the said Faurot was the president.

That a little while ago the report of the Comptroller of the Currency to the second session of the Fifty-second Congress of the United States, dated Dec. 5, 1892, came under your orator's notice, and that in that said report it was stated:

"The doors of the Lima National Bank of Lima, Ohio, were closed to business March 1, 1892. From the date of its organization the management of the bank continuously provoked criticism by the Comptroller of the Currency for apparent violations of the restrictive provisions of the law.

The president, possessing considerable wealth and business sagacity, was the principal promoter of a number of local and foreign enterprises and diverted the funds of the bank to his individual uses. At times he would crowd paper based on these outside

24 schemes into the bank to the almost entire exclusion of other and legitimate loans. Accommodation notes of clerks and other employés were resorted to until the president's methods became a matter of almost public notoriety. The depositors naturally lost confidence and deposits were withdrawn to such an extent as to force the bank to rediscount all its good paper. When this crisis was reached an attempt was made to place the bank in voluntary liquidation, but failed, because it was impossible at the time to realize from the assets the necessary funds for prompt payment of creditors. A sharp run, which exhausted nearly all the cash on hand, precipitated its closing."

Your orator avers that in pursuance of such information he was enabled to get at the books of said bank and ascertain therefrom that said Faurot and Bailey were the owners of the 500 shares of stock in the Edwards Oil Burner Company which were sold by the said Bailey to your orator for the sum of $30,000, and the said Faurot and Bailey, after having ascertained that your orator was willing to purchase said 500 shares of stock at said price, by a conspiracy between them and false representations to your orator, representing said stock to be treasury stock of said corporation to be used in the promotion of said corporation in its business and as stock belonging to said corporation for that purpose, and by falsely representing that such stock was of great value, and that none of it had been sold for less than its par value, which was $100 per share,

and by means of the statements made in said bill of com-
25 plaint, copy of which bill of complaint is made part of this bill and referred to as such, he was interested therein; that the said Faurot and Bailey formed a copartnership to buy said stock of one Edwards, who was the owner of said stock, and had received said stock in pay for certain patents intended to be used by said Edwards Oil Burner Company; said Bailey purchased such stock on account of himself and Faurot as copartners, which was then worthless and of no market value, from said Edwards on the 27th day of January, 1887, for the sum practically of $1,800, and gave his note therefor in such a manner that in case your orator should buy said stock, which said Faurot and Bailey were then certain he would do, that $1,800 should be paid out of the part of the $30,000 paid by your orator to them.

Your orator avers that said $1,800 *was* paid out of funds obtained from him as part of the $30,000 which he was to pay for said stock, and that on obtaining said stock from said Edwards the said 500 shares were soon afterwards sold to your said orator for the sum of $30,000, and the profits were by said prior fraudulent agreement between said Faurot and Bailey divided share and share alike between them, and that the books of said bank by their entries show the notes were discounted by said Lima National bank and how the said sums of money paid by your orator from time to time on said stock were by virtue of said conspiracy and fraudulent agreement divided between the said Faurot and the said Bailey.

Your orator will further show that some time prior to the pur-
chase of said stock from said Faurot and Bailey he went to
26 the city of Lima, Ohio, for the purpose of erecting certain oil tanks for the Standard Oil Company, and while there formed the acquaintance of the said Faurot through said Bailey, and, the said Faurot being the president of said bank, he soon became on confidential and friendly relations with him from daily or frequent consultations with him as to his affairs and made the said bank, of which the said Faurot was president, his bank deposit.

That said Faurot, almost from the time that your orator arrived at the said city of Lima until he discovered the fraud that was perpetrated upon him in the sale of this stock, was his banker and trusted adviser, and that said Faurot, while such banker and trusted adviser and occupying confidential and fiduciary relations in connection with your orator as such banker, stated to him when applied to for advice as to whether your orator should become the purchaser of said stock that said stock was of great value and likely to become still more so, when the said Faurot well knew as the treasurer of said Edwards Oil Burner Company that said company had no capital and was practically insolvent and worthless.

Your orator prior to making up his mind to purchase said stock made enquiry of said Faurot as to the value of the stock and the business of the company, and said Faurot stated that he never went into any enterprise without fully investigating it, and as he thought of buying some of the stock he would go fully into it and he would advise him.

That your orator stated at the time that he was about pur-
27 chasing such stock from said Bailey that he came to see Faurot as a friend and as his adviser and would rely on his personal honor that he, the said Faurot, would tell him the truth about the stock and its value and assured him he would rely on whatever he might state without making further enquiry.

That said Faurot represented to your orator that your orator could rely implicitly on the statements of said Bailey, and that he himself had investigated the matter, as he had promised your orator that he would do, as he had some interest in the company and intended to purchase a further block of the said stock, and fraudulently concealed from your orator the fact that the said stock, which Bailey represented to — the treasury stock belonging to said company, was stock which he himself and Bailey owned in partnership, for which they had paid the sum of $1,809 on time, and by falsely concealing from him the fact that the company had not consented to sell said stock for 50 cents on the dollar or any other sum, but the same was the said Faurot's and Bailey's own stock and with which the said company had nothing to do.

Your orator would further show unto your honor that before going to said Faurot to inquire of him the value of said stock the said Bailey had, before purchased said stock from said Edwards, before selling it to your orator, constantly been puffing said stock to your orator, and impressed upon him the desirability of becoming the owner of shares of stock in said company; that he constantly represented the company to be doing a large and prosperous
28 business, and that the company had formed connections with some officers of the Standard Oil Company, as set forth in the first bill of complaint, by which the said company would become a very prosperous and wealthy concern.

Your orator would further show that the said Bailey so impressed your orator with said statements and the confidence that he had in said Bailey by reason of the intimate relations between the said Bailey and the said Faurot, who was his banker, and the representations of the said Faurot as to the character of said Bailey *and* he expressed a willingness to become the owner of some of the shares of said stock.

And that said Bailey then and there represented unto your orator that he would go for him and see if he could induce the company to sell him five hundred shares of said stock at 60 cts. on the dollar, but that the same must be kept quiet; neither Mr. Rockefeller nor any of the other officers of the Standard Oil Company interested in the said company should be made aware of the fact, and that the company did not want it known that its stock had ever been sold as low as 60 cts. per share, and advised your orator to keep quiet about it.

That said Bailey afterwards came to your orator, some time in the month of June, 1887, and reported to your orator that he had got the consent of the said company to sell to him its treasury stock of five hundred shares for the sum of $30,000 and to take his notes therefor.

29 That your orator upon such representations went to the said Faurot and laid the matter before him as to the advisability of buying said stock and as — the condition of the said company and the value of the stock and as to the character of Bailey.

And the said Faurot assured him that the said statements of the said Bailey could be relied upon, and that the stock was very valuable and would become more so from time to time, and advised your orator to buy the said stock of the said company.

That your orator has now discovered and is able to prove by said books of said bank and by the officers of said bank and by instruments in writing that the said Faurot and Bailey were the owners of said stock at the time that the stock was purchased from the said Edwards and at the time when it was offered to your orator, and they among themselves agreed to divide whatever profit they might obtain from the sale of said stock to your orator, well knowing at the time they sold the said stock that it was worthless, and that the representations made by them were false and fraudulent and dishonest, and that the said Bailey was used only as a part of a scheme to entrap your orator into the desire to purchase said stock, and the said Faurot and Bailey were both engaged as confederates in selling to your orator said stock and fradulently obtaining from your orator the said promis-ory notes therefor, whereby your orator was wholly defrauded out of every cent that he paid upon said notes, and if he is compelled to pay the balance of said notes will also suffer a loss to that extent.

30 Your orator will show that the stock at all times was entirely worthless and without any market value and that said parties knew that it was worthless and without any value.

Your orator would further show that after the payment of one or more of these notes and at the maturity of the two promis-ory notes sued on by said Faurot as aforesaid he inquired of the said Faurot how the company was getting along; that he himself was so busy with his affairs that he couldn't look after the matter, and that he desired to sell some of said stock for the purpose of paying some of these notes as they matured.

That Faurot assured him that the company was getting along well and prosperous, and that the said Bailey, on asking his advice as to selling—the said Bailey urged your orator not to offer to sell or put any of the stock on the market, as the company was about to pay a big dividend.

Your orator would further show that the said Bailey discouraged him, at the time of making the purchase of the stock, from consulting Rockafeller or Squires in reference to the same; also prejudiced him against E. O. Edwards, the patentee of the patents, which *was* the sole capital stock of the company, from making an inquiry of him as to the condition of the company, so that from the first your orator, having perfect confidence in the said Faurot and the said Bailey, relied implicitly on their honor and character and said statements and made no enquiries whatever as to the statements that they made as to the stock or its value.

31 Your orator would further show unto your honor that your orator, on the 19th day of November, 1888, together with his wife, conveyed to Benjamin C. Faurot, as trustee, lots 1, 4, 5, 8, and 9, in block 1, in Peter Schimp's subdivision of that part lying west of the railroad of the southeast quarter of the S. E. ¼ section 9, township 39, range 14 east, of the third principal meridian in the county of Cook, State of Illinois, in payment for one of the promis-ory notes dated on the 27th day of March, 1888, and such was given in part payment of the aforesaid stock of the Edwards Oil Burner Company.

That your orator deeded the same to the said Benjamin C. Faurot as trustee at the request of A. O. Bailey, who was the president of the Edwards Oil Burner Company, supposing and believing at the time that the stock which he purchased was treasury stock or corporation stock purchased by him from said corporation itself for the sum of $30,000, as aforesaid, and for which he gave his promis-ory notes, and that the said Benjamin C. Faurot, being the treasurer of said company, that the conveyance was made to him as trustee for said company and for the benefit of said company and in payment of the said note, which your orator at that time believed to be due and owing to said Edwards Oil Burner Company and not otherwise.

Your orator would further show that at the time he made his conveyance as aforesaid there was a mortgage on said property for the sum of about $800, which mortgage was to secure a note payable to Henrietta Stuart, which note had not then matured,
32 and your orator paid to said Benjamin C. Faurot, trustee as aforesaid, whatever sum would be due upon said note, together with interest at the time of its maturity, which said sum was to take up said note and relieve said mortgage.

That afterwards the Park National Bank of the City of Chicago levied upon said premises, by virtue of some claim or judgment against the said Benjamin C. Faurot, all right, title, *of* interest of said Faurot in said property; that the said levy was made on or about April 13, 1889, and that said Park National bank made a like levy on said property for like cause of action on June 15, 1889.

That afterwards, on the 29th day of October, 1889, the said property having been sold by the sheriff of Cook county for the claim of the said Park National bank by force of the said levy to the said national bank, *and* certificate of sale was made therefor, and on a like sale and like levy certificate of sale was made therefor to the same Park National bank on October 29, 1889.

That afterwards, to wit, on October 22, 1890, the said Benjamin C. Faurot redeemed the said property from said sales.

That afterwards, on Nov. 18, 1890, your orator became wholly ignorant of any competent evidence to establish the fraud committed on him, as set forth in this bill, for conveying said property with the wrongful purchase of said stock, — sued out in his said suit against said Faurot and said Bailey in the superior court of Cook county an attachment in aid of said suit, and levied on the

33 right, title, and interest of the said Benjamin C [illegible]eiot in said property, which said attachment is now in full force and effect.

Your orator would further show that the said note of the — Henrietta Stuart, for which the said Faurot received from your orator the money with which to pay said note, said funds having been fraudulently conveyed to his own use and which he held to pay said note, the said Henrietta Stuart, on Nov. 24, 1891, filed a bill of foreclosure on her said mortgage.

That upon such foreclosure such proceedings were had that W. Irving Culver, a master in chancery, sold said property on the 29th of Nov., 1892, to Wm. T. Brown, and the said master, on the 30th day of November, 1892, made a like sale to said William T. Brown by virtue of said decree of foreclosure.

Your orator would further show that prior to that time, to wit, on Feb. 5, 1892, the said Benjamin C. Faurot being duly indebted to the Lima National bank, whereof he had been president, and having fraudulently taken the funds of said bank and improperly used them for his own purposes, and in order to escape, under the act of Congress, punishment for an act of such malfeasance of office, conveyed said premises on said 5th day of Feb., 1892, to clear or satisfy part of the claim which said Lima bank had against him by reason of the aforesaid facts.

And your orator charges that afterwards, on Dec. 2, 1892, Otho L. Hayes, being appointed receiver of the said Lima National bank, did by deed reconvey to said Benjamin C. Faurot said premises.

34 And the said W. Irving Culver, master in chancery, did issue, on Dec. 23, 1892, a certificate of redemption of the sale made by him on the foreclosure of the mortgage had in favor of the said Henrietta Stuart, so that it appears there is no one having any interest in said premises of record except the interest of the said Benjamin C. Faurot, which interest was obtained by fraud and deceit from your orator.

Your orator will further show unto your honor that on or about the 1st day of September, 1888, he discovered that he had been cheated and swindled out of his moneys and property, and so soon as he ascertained the fact he tendered back the stock which had been delivered to him, to wit, three hundred shares of stock, to said Faurot and Bailey and offered to take fifty dollars per share for said stock; that they declined to accept said offer, saying that they were not buying any stock.

That your orator at the time of filing said bill tendered and now tenders back to the defendants all the said stock delivered to him in the transaction.

Your orator would show that the balance of said stock was at the time in the possession and control of said Faurot, and that said Faurot has since that time sold or caused the same to be sold under a pretense of partly satisfying his pretended demands against your orator on said promissory notes, and that said Faurot caused a suit to be commenced in the court of common pleas in the county of

Allen, in the State of Ohio, on September the 20th, 1888, on
35 the two notes given by your orator for the sum — $2,500 each, the same being renewals of one $5,000 note for the purchase of this stock, and the said Faurot caused the said stock to be attached, together with stock of the Silvey Electric Company, $2,000, whereof the said Faurot was president of said company and had control thereof, by reason of your orator being a non-resident of the State of Ohio.

That such proceedings were afterwards had that said stocks were sold, and the said proceeds thereof paid to the said Faurot to be credited on said foreign attachment proceedings on said notes given as aforesaid.

Your orator would further show that judgment was entered upon said promis-ory notes by confession, the same being judgment notes authorizing and empowering any attorney-at-law of the State of Ohio, at any time after the above sum becomes due, with or without process, to appear before any court of record in the State of Ohio and confess judgment in favor of said bank for said amount, interest, and costs against us or any of us, and to realize all error and writs of error and the rights of second trial and the right of appeal and stay the execution.

That after the matters and things above set forth occurred the said Faurot took said promis-ory notes, and without crediting the amount received on said judgment in said Allen county circuit court and on the 28th day of September, 1888, commenced suit on said promis-ory notes in the Lake county circuit court of the
36 State of Indiana, and did then and there cause an attachment to issue out of said court, and did then and there pretend to attach property which said Faurot pretended that your orator had an interest therein, and did then and there afterwards take judgment by default in said attachment proceedings upon said notes in the said Lake county circuit court and State of Indiana commenced by attachment as aforesaid, and without personal service upon your orator did then and there, on the 16th day of September, 1889, issue an execution on said attachment and said judgment against the said pretended estate of your orator, and that the said execution or order of sale is still pending unsatisfied, whereby your orator is greatly vexed in the premises by reason of the aforesaid judgment and execution.

Your orator would further show unto your honors that the property attached in said proceeding by said Faurot is the property of the William Graver tank works, a corporation created and existing by virtue of the law, and that it is not the property of your orator but that your orator is a stockholder therein, and is and will be greatly injured by the suing out of said attachment and the levying of an execution thereon by the said Faurot.

Your orator would further show that at the time of giving his said promissory notes for payment thereof the said stock was retained by said Faurot and said Bailey as collateral security for payment of said notes, with the agreement that as soon as he paid the first $5,000 he should receive a block of 100 shares of stock, and

as soon as he has paid another $5,000 he should receive an-
37 other block, and so on until he paid for the whole stock.

Your orator would further show unto your honor that on the 8th day of January, 1894, upon certain witnesses in his behalf arriving in the city of Chicago to give evidence in said cause, with your orator as defendant, in the said United States court, said witnesses were examined by your orator's counsel, and found by the statements of said witnesses that they would swear from their own personal knowledge that the said Faurot and Bailey were jointly interested in said stock in the said Edwards Oil Burner Company sold to your orator as aforesaid at the time that the said stock was sold to your orator, and that said stock was bought by the said Faurot and Bailey for the sum of $1,800 for the purpose of fraudulently selling the same to your orator for the sum of $30,000, and that upon selling the said stock to your orator upon his said notes the said Faurot directed the cashier of the said Lima National bank, of which he was the president, to discount said notes, and that said Faurot and Bailey equally divided the proceeds of said discount between themselves.

Your orator would show unto your honor that it was not until the 8th day of January, 1894, that he was furnished with certain, positive, conclusive, and positive evidence to prove these facts, and after hearing the statements of said witnesses he now states that fact to be that said Faurot and Bailey concocted the scheme of selling your orator the said stock months before said stock was actually
sold to him, and that said Faurot used his confidential
38 relations with your orator as his confidential friend and adviser to induce him to become the purchaser of said stock.

Your orator would further show unto your honor that on the 9th day of the said month of January he was informed by his solicitors and now believes that there is great danger, by reason of the decree obtained in this honorable court as aforesaid, dismissing his said bill of complaint upon its merits, and that he will be unable to offer the matters and things set up in his original bill of complaint and this bill of complaint as a defense to the suit on the said promis-ory notes now about to be tried in the United States court.

Your orator charges that the said decree was obtained by false swearing and perjury of said Faurot and Bailey, and that this court was deceived and imposed on thereby, and that said decree was obtained by fraud.

Wherefore your orator would show that by reason of the matters and things set up in his bill he may be at law remediless in the premises and be deprived of a just and valid defense to the said Faurot's said bill in the U. S. court, and will be unable to maintain the said suit for damages against the said Faurot and Bailey by reason of this fraudulent decree, and that he can only have relief in equity.

Your orator would further show unto your honor that the suit
brought by the said Faurot against your orator on the said
39 promissory notes in the U. S. court for the northern district of Illinois was set down for trial before a jury on January 8,

1894, and is now waiting to be called as soon as a case on trial is disposed of. The said case will probably come up on this day or on the 12th of January, 1894.

That the suit of your orator against said Faurot is also set down in this honorable court, on the law side thereof, on the 12th day of January, 1894.

That the said Faurot is a non-resident of the State of Illinois, and your orator does not know where he now is, and therefore he cannot be conveniently served with a notice.

Your orator therefore charges that the rights of your orator will be unduly prejudiced if the injunction is not issued immediately and without notice to the defendants.

Wherefore he prays your honor that the said Faurot, in his said action at law in the said U. S. circuit court against your orator, may be enjoined from using said decree as *res judicata* or estoppel to your orator making a full defense by the offering in evidence of competent testimony to establish the matters and things set up in this bill, and that the said Faurot and Bailey may be enjoined from setting up said decree in equity as *res judicata* and has estoppel in answer to your orator's action in the case against the said Faurot and Bailey, which counts upon the fraud and deceit of the said Faurot and Bailey as aforesaid.

40 Second. That the said decree of your honor dismissing the bill originally filed in this case, dismissing the said bill for want of equity, may be reversed and no further proceedings taken thereon, and that the said decree dismissing the bill originally filed in this case, dismissing the said bill for want of equity, may, by reason of the false swearing and perjury of the defendants in their respective answers to said bill, be declared null and void and of no effect, and that the said defendants or either of them may not be permitted to plead the same in any court of competent jurisdiction or otherwise use the said decree to the prejudice of your orator, and that the said Faurot might be perpetually enjoined from proceeding upon his said judgment obtained in the Lake county circuit court of the State of Indiana to collect his said judgment thereon against your orator and from proceeding in any way, by execution or otherwise, to harass or injure your orator in the premises.

Third. That your orator may be decreed to have, upon the surrender of the stock that he already has and delivered to him by the said defendants, Faurot and Bailey, the right to a reconveyance of said premises conveyed by him as aforesaid and which is described as follows:

Lots 1, 4, 5, 8, and 9, in block 1, in Peter Shimp's subdivision of that part lying west of the railroad of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, sec. 9, town. 38, range 14 east, of the third principal meridian in the county of Cook and State of Illinois.

41 Fourth. And that the said Faurot may be decreed to account to him for all rents, issues, and profits during the time that he has had possession of the premises by force of said conveyance obtained as aforesaid from your orator, and also that he may

be perpetually enjoined from disposing of said premises or in any way incumbering the same.

Fifth. And that the said Faurot and the said Bailey may be decreed to account to him for all damages he has sustained in the premises and for all the moneys that he has paid out in consequence of said deceit, and that the said Faurot be ordered to return to your orator the said notes now held by him given for the purchase of the said Edwards Oil Burner Company stock or renewals of said notes, and that the said Faurot be perpetually enjoined from using or offering the decree of this honorable court, made on the 8th day of July, 1889, in your orator's bill of equity then on file in this honorable court, or from setting up said decree as an answer, plea, or defense in the suit brought by your orator on the law side of this honorable court against the said Faurot and Bailey for damages for the injury he has received by reason of the matters and things set up in this bill of complaint.

Your orator therefore prays that the complainant may have such other and further relief in the premises as — shall be entitled to receive.

Wherefore — you honor grant unto your orator the writ of subpœna issuing out of and under the seal of this court, directed to said
42 defendants, Faurot and Bailey, commanding them and each of them to appear before your honor in the circuit court aforesaid at the return day of next term in this honorable court, to then and there answer the premises and abide the order and decree of this honorable court.

(Signed) WM. GRAVER.
HENRY S. MONROE, *Solicitor.*

Subscribed and sworn to by William H. Graver this 11th day of January, A. D. 1894, before me—

PENOYER L. SHERMAN,
Master in Chancery of the Superior Court of Cook County.

ROBERT REA,
As of Counsel.

STATE OF ILLINOIS, } ss:
Cook County, }

On this — day of January, A. D. 1894, before me personally appeared the above-named William Graver and made oath that he has read the above bill subscribed by him and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated to be upon his information or belief, and that as to those matters he believes it to be true.

WM. GRAVER.

Subscribed and sworn to before me this 11 day of January, 1894.

P. L. SHERMAN,
PENOYER L. SHERMAN,
Master in Chancery of the Superior Court, Cook County.

43 Afterwards, to wit, on the 9th day of June, 1894, the defendant Benjamin C. Faurot, appellee here, by his solicitors, filed in the circuit court of the United States for the northern district of Illinois in this suit his demurrer to such bill of complaint in the words and figures following, to wit:

Demurrer.

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division.

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

WILLIAM GRAVER
v.
BENJAMIN C. FAUROT *et al.* } In Chancery.

The demurrer of Benjamin C. Faurot, defendant, to the bill of complaint of William Graver, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill, and for cause of demurrer shows that the complainant has not in and by his said bill made or stated such a case as entitled him in a court of equity to any discovery or relief from or against this defendant touching the matters contained in the said bill or any of such matters.

44 And for a further cause of demurrer this defendant shows that it does not appear in and by said bill that leave of court was had and obtained before the filing thereof.

And for a further cause of demurrer this defendant shows that said bill is defective in that it contains no direction or address whatsoever, and that the said bill is defective in that it contains no introduction whatsoever.

And for a further cause of demurrer this defendant shows that it appears by the said bill that the same is exhibited against this defendant and the other defendant therein named for distinct matters and causes, in several whereof, as appears by the said bill, this defendant is not in any manner interested or concerned, and that the bill is altogether multifarious.

And for a further cause of demurrer this defendant shows that said bill is not an original bill to impeach the decree for fraud, because it does not appear from said bill that there was any fraud in the fact of the entry of the decree, and therefore the said decree of the superior court of Cook county complained of in said bill cannot be declared null and void and of no effect, as prayed in said bill.

And for a further cause of demurrer this defendant shows that it does not appear from said bill that the alleged newly discovered

evidence is such that the complainant by use of reasonable diligence could not have known thereof before the entry of the decree in the superior court of Cook county mentioned in said bill.

45 And for a further cause of demurrer this defendant shows that it does not appear from said bill that the affidavits of the alleged newly discovered witnesses could not readily have been obtained and made a part of said bill.

And for a further cause of demurrer this defendant shows that the said bill does not give the names of the alleged new witnesses nor does it give the substance of their testimony.

And for a further cause of demurrer this defendant shows that said bill does not show performance of the requirements of the original decree mentioned in said bill.

And for a further cause of demurrer this defendant shows that it appears from said bill that the alleged newly discovered evidence is merely cumulative.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant demurs to the said bill and to all the matters and things therein contained, and prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, and he prays to be dismissed with his reasonable costs in this behalf sustained.

BENJAMIN C. FAUROT,
By FRANK O. LOWDEN AND
FRANK L. WEAN,
Solicitors for said Defendant.

46 UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

WILLIAM GRAVER }
v.
BENJAMIN C. FAUROT *et al.* }

I certify that, in my opinion, the foregoing demurrer of Benjamin C. Faurot, defendant, to the bill of complaint of William Graver, complainant, is well founded in law and proper to be filed in the above case.

FRANK O. LOWDEN,
Solicitor and Counsel for Defendant.

STATE OF OHIO, }
County of Allen, } *ss:*

Benjamin C. Faurot, the defendant, on oath states that he has read the foregoing demurrer to the bill of complaint of Willian Graver in the above-entitled cause, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

BENJAMIN C. FAUROT.

Subscribed and sworn to before me this 8th day of June, 1894.

HENRY W. NEFF,

[SEAL.] *Notary Public, Allen Co., Ohio.*

(Endorsed:) Filed Jun- 9, 1894. S. W. Burnham, clerk.

47 Such demurrer was, on the 8th day of November, 1894, upon argument, sustained in the circuit court for the northern district of Illinois, and a decree entered dismissing the bill—The court rendering the following opinion thereon:

Opinion.

United States Circuit Court, Northern District of Illinois.

WILLIAM GRAVER, Complainant,
vs.
BENJAMIN C. FAUROT.

Upon demurrer to bill.

JENKINS, *Circuit Judge:*

This bill is either a bill of review seeking a rehearing of the original suit upon the ground of newly discovered evidence or is an original bill attacking the former decree for fraud. If it be a bill of review this court cannot properly entertain jurisdiction (Barrow *v.* Hunton, 99 U. S., 80; Johnson *v.* Waters, 111 U. S., 640; Marshall *v.* Holmes, 141 U. S., 589); otherwise if it be an original bill attacking the former decree for fraud.

I must therefore consider this bill as an original bill.

The decree sought to be impeached was rendered on the 8th of July, 1889, and is as follows:

"This cause coming on to be heard, came the parties hereto, by their solicitors, respectively, and the court, having heard the
48 evidence, arguments of counsel, and being fully advised in the premises, finds *that* the equities to be with the defendant. Therefore it is ordered that this case be, and the same is hereby, dismissed at the complainant's cost for want of equity and the defendants have of the said plaintiff their costs in the premises."

It is asserted in the present bill that neither the complainant nor the solicitor were present at the hearing of the cause, if any were ever had, and it is charged that no evidence was heard in the cause at the final hearing thereof or arguments made by counsel so far as respects the complainant, and that the matter was disposed of *ex parte* and without notice. There would seem to have been a motion to dissolve an injunction which had been granted in that suit, and the motion was allowed; that no replication to the answer was filed, and that some six months after such dissolution of the injunction this final decree was rendered. It is claimed that this decree is not, for the reasons stated, *res adjudicata*, and that this court should look into the circumstances and so hold, treating that decree as a mere dismissal of the bill, and not to be a final and conclusive adjudication

upon the merits of the action. Ordinarily a dismissal of a bill in chancery stands on the same footing as a judgment at law, and will be presumed to be a final and conclusive adjudication upon the merits, whether or not heard and determined, unless the contrary is apparent upon the face of the pleadings or in the decree of the court. 2 Smith's Leading Cases, 667; Durant *v.* Essex, 7 Wall., 107; Tankersley *v.* Pettis, 71 Ala., 179.

49 The decree upon its face purports to be a final decree upon the merits, and in the absence of fraud this court is not at liberty to consider whether the statements of the decree be true or not.

This original decree is now attacked for fraud, consisting, as charged in the bill, in "false swearing and perjury of said Faurot and Bailey, and that this court was deceived and imposed on thereby, and that said decree was obtained by fraud." This false swearing and perjury were in the verification to the answer to the bill in that suit. The question is therefore sharply presented whether a judgment can be attacked for fraud and the prevailing party deprived of the benefit thereof when he has obtained that judgment or decree by a false answer or by perjury in giving evidence therein.

Assuming the facts to be as stated in this bill, I have been impressed with the conviction that the complainant has been grievously defrauded. It will not answer, however, to depart from well-settled principles upon which courts of equity proceed to rectify an occasional injustice. Such a course usually results in the working of greater injustice. It should be the aim of the court to move along the lines of well-established principles and not to permit hard cases to make bad precedents. I have struggled to find a way by which this complainant may be relieved from the gross fraud charged in this bill and by which he may escape the conclusive effect of the prior decree. I am confronted with two decisions

50 of the ultimate tribunal which I have not been able to reconcile. In U. S. *v.* Throckmorton, 98 U. S., 61, the court, by Mr. Justice Miller, in considering the question of what frauds are sufficient to sanction a court to set aside a judgment or decree between the same parties, uses this language:

If the court has been mistaken in the law there is a remedy by writ of error. If the jury has been mistaken in the facts the remedy is by motion for new trial.

If there has been evidence discovered since the trial a motion for a new trial will give appropriate relief. But all these are parts of the same proceeding; relief is given in the same suit, and the party is not vexed by another suit for the same matter. So in a suit in chancery, on proper showing, a rehearing is granted. If the injury complained of is an erroneous decision an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final a bill of review on that ground may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the same suit, and the rule framed for the repose of society is not violated.

But there is an admitted exception to this general rule in cases

where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented
51 from exhibiting fully his case by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of compromise, or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff, or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the attorney regularly employed corruptly sells out his client's interest to the other side—these and similar cases which show that there has never been a real contest in the trial or hearing of the case are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and a final hearing. See Wells, *res adjudicata*, sect. 499; Pearce *v.* Olney, 20 Conn., 544; Wierich *v.* De Zoya, 7 Ill., 385; Kent *v.* Richards, 3 Md. Ch., 392; Smith *v.* Lowry, 1 Johns. (N. Y.) Ch., 320; De Louis *et al. v.* Meck *et al.*, 2 Iowa, 55.

In all these cases and many others which have been examined relief has been granted on the ground that by some fraud practiced directly upon the party seeking relief against the judgment or decree that party has been prevented from presenting all of his case to the court.

On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. Mr. Wells, in his very useful work on *res adjudicata*,
52 says, sect. 499: "Fraud vitiates everything, and a judgment equally with a contract—that is, a judgment obtained directly by fraud and not merely a judgment founded on a fraudulent instrument—for in general the court will not go again into the merits of an action for the purpose of detecting and annulling the fraud. Likewise there are few exceptions to the rule that equity will not go behind the judgment to interpose in the cause itself, but only when there was some hinderance besides the negligence of the defendant in presenting the defense in the legal action. There is an old case in South Carolina to the effect that fraud in obtaining a bill of sale would justify equitable interference as to the judgment obtained thereon. But I judge it stands almost or quite alone and has no weight as a precedent." The case he refers to is Crauford *v.* Crauford, 4 Desau (S. C.), 176.

See also Bigelow on Fraud, 170–172.

There the fraud consisted of a forged grant, accompanied by depositions of perjured witnesses, whereby, as was claimed, the court was imposed upon to render the objectional decree. But the superior court affirmed a decree dismissing the bill, holding that the frauds for which a bill to set aside a judgment or decree between the same parties will be sustained are those which are extrinsic or collateral to the matter tried and not a fraud which was

in issue in the primary suit, and that the cases where such relief has been granted are those in which, by fraud or deception upon the unsuccessful party, he has been prevented from exhibiting fully his case, by reason of which there has never been a real contest before the court of the subject-matter of the suit

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This case would seem to control action upon the present demurrer. It has never been reversed or limited, and is referred to approvingly in the subsequent case to which I now advert. In Marshall *v.* Holmes, 141 U. S., 598, a bill was filed in the State court of Louisiana to annul and avoid a certain judgment obtained at law upon false and forged documents. It will be observed that the fraud asserted was of the same character as in the case of U. S. *v.* Throckmorton.

The case was sought to be removed to the Federal court, but removal was refused by the State court, resulting upon final hearing in the State court in the dismissal of the bill. The case was then appealed to the court of appeals for the second circuit in the State of Louisiana, and the original judgment being affirmed, except that the general damages were reduced, a writ of error was prosecuted to the Supreme Court of the United States. The latter court held that the State authority was without authority to proceed further in the suit after the filing of the petition for removal, if it was a suit in which the circuit court of the United States could rightfully take jurisdiction. The case was held to be such an one and the decree was reversed. The court reviews the averments of the petition and declares the ground of fraud to be that the judgment complained of "would not have been rendered against Mrs. Marshall but for the use in evidence of the letter alleged to be forged," and then observes:

"The case evidently to be presented by the petition is one where, without negligence, laches, or other fault upon the part of the petitioner, Mayer has fraudulently obtained judgments which he seeks, against conscience, to enforce by execution. While, as a general rule, a defense cannot be set up in equity which has been fully and fairly tried at law, and although, in view of the large powers now exercised by courts of law over their judgments, a court of the United States, sitting in equity, will not assume to control such judgments for the purpose simply of giving a new trial, it is the settled doctrine that 'any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.' Marine Ins. Co. *v.* Hodgson, 7 Cranch, 332, 336; Hendrickson *v.* Hinckley, 17 How., 443, 445; Crim *v.* Handley, 94 U. S., 652, 653; Metcalf *v.* Williams, 104 U. S., 93, 96; Embry *v.* Palmer, 107 U. S., 3, 11; Knox County *v.* Harshman, 133 U. S., 152, 154; 2 Story's Eq. Jur., secs. 887, 1574; Floyd *v.* Jayne, 6 Johns. Ch., 479, 482. See also United States *v.* Throckmorton, 98 U. S., 61, 65."

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It will be observed that in the statement of general principles of

law there is no conflict in the cases. The conflict, if any, is in the application of legal principles to the facts then in point.

I have carefully examined the cases which the Supreme Court refer to in the latter opinion. Each of them was a case where
55 the fraud was intrinsic or collateral to the matter tried and undoubtedly fell within the doctrine of U. S. *v.* Throckmorton. As before stated, I am unable to distinguish those two cases upon the facts. The matter of the fraud was the same in both cases. In both the fraud was in the use of forged documents and false evidence offered by the successful party. In the one case the bill was dismissed and in the other sustained. Both decisions were by a unanimous court. Three of the justices who were members of the court when the former case was decided were members of the court when the latter was decided, including the justice who delivered the opinion of the court. I do not see how both can stand, and yet the former case is approvingly referred to in the latter. Possibly the fault is mine that I am unable to distinguish them. In the doubtful frame of mind in which I am left by these two apparently conflicting decisions I might have recourse to the maxim that the greater regard should be given to the latter decision were it not for the fact that in the latter case the former decision is approvingly referred to and apparently sought to be followed.

Under the circumstances I think it would be a hardship upon the parties to put them to the expense of marshalling their evidence when the right to maintain the bill is thus placed in doubt. It would be the prudent course to first determine the right to maintain the bill on the facts stated, and in that view I have concluded *pro forma* to sustain the demurrer and dismiss the bill, and the complainant, by appeal to the court of appeals, may speedily
56 have the question determined in advance of an issue upon the merits. That court may, perhaps, be able to reconcile the two cases referred to, or, if unable so to do, can certify the question to the Supreme Court for its solution.

The demurrer will be sustained and the bill dismissed.

(Endorsed:) Filed Nov. 8, 1894. S. W. Burnham, clerk.

Complainant thereupon appealed from such decision and decree of the circuit court to this court.

In view of the decisions of the Supreme Court of the United States in the cases of The United States *v.* Throckmorton, 98 U. S., 61, and Marshall *v.* Holmes, 141 U. S., 598, this court is in doubt touching the case in hand and desires advice and instruction upon the following question:

Question.

Whether (assuming the bill of complaint to be in other respects sufficient) the alleged false swearing and perjury in the respective answers of the defendants in the original suit in the superior court of the county of Cook, State of Illinois, are, in the law, available in

this suit as ground for a decree, setting aside and declaring void the decree so rendered in the superior court of the county of Cook?

(Signed) WILLIAM A. WOODS,
Circuit Judge.

(Signed) JOHN H. BAKER,
District Judge.

57 United States Circuit Court of Appeals for the Seventh Circuit.

I, Oliver T. Morton, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing typewritten pages, numbered from one to fifty-six, inclusive, contain a true copy of the certificate of the United States circuit court of appeals for the seventh circuit to the Supreme Court of the United States in the case of William Graver, appellant, *vs.* Benjamin C. Faurot, appellee, No. 217, October term, 1894, as the same remains upon the files and records of said United States circuit court of appeals for the seventh circuit.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 29th day of May, A. D. 1895.

OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Endorsed on cover: Case No. 16,069. U. S. circuit court of appeals, seventh circuit. Term No., 779. William Graver, appellant, *vs.* Benjamin C. Faurot. (Certificate.) Filed October 18, 1895.

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IN THE

Supreme Court of the United States,

FOR THE OCTOBER TERM, 1895.

THE LAW ASSOCIATION
OF
PHILADELPHIA.

WILLIAM GRAVER,
Appellant,

vs.

BENJAMIN C. FAUROT,
Appellee.

No. 779.

Certificate from the Circuit Court of Appeals for the Seventh Judicial Circuit to the Supreme Court, October Term, 1894.

Comes now appellant by his Solicitor and Counsel appearing hat behalf, and moves the Court to advance the case upon calendar, and to order that the same may be set down for ıment so soon as the Court can conveniently do so, for the wing reasons:

ıis is a certificate submitting a proposition of law to this ɔrable Court to answer for the instruction of the Court ɾ.

ɛ appellant filed his bill in equity in the Superior Court ɔk County in the State of Illinois (which suit was duly operly removed into the Circuit Court of the United for the Northern District of Illinois), to impeach for

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IN THE

Supreme Court of the United States,

FOR THE OCTOBER TERM, 1895.

THE LAW ASSOCIATION OF PHILADELPHIA.

WILLIAM GRAVE[illegible],
Appellant,

vs.

No. 779.

BENJAMIN C. FAUROT,
Appellee.

Certificate from the Circuit Court of Appeals for the Seventh Judicial Circuit to the Supreme Court, October Term, 1894.

Comes now appellant by his Solicitor and Counsel appearing in that behalf, and moves the Court to advance the case upon the calendar, and to order that the same may be set down for argument so soon as the Court can conveniently do so, for the following reasons:

This is a certificate submitting a proposition of law to this Honorable Court to answer for the instruction of the Court below.

The appellant filed his bill in equity in the Superior Court of Cook County in the State of Illinois (which suit was duly and properly removed into the Circuit Court of the United States for the Northern District of Illinois), to impeach for

fraud a decree in equity rendered by the Superior Court on the Eighth of July, 1889, in a certain suit therein depending, wherein William Graver, the appellant here, was complainant, and Benjamin C. Faurot, the appellee here, and one A. O. Bailey were defendants, which decree dismissed the complainant's bill upon the defendants both coming in under oath (the bill requiring so to answer) denying each and every material allegation in the bill. There was no other evidence, no trial upon the merits.

The case was heard in the United States Circuit Court upon the general demurrer of the defendant Faurot, and the bill to set aside the original decree on account of the alleged perjury of the defendants in their respective answers.

The appellant has a large number of witnesses by whom he expects to establish in connection with written evidence this perjury, and on account of their residing out of the jurisdiction of the Court and at places widely distant from each other, the Circuit Judge in his written opinion, which is incorporated with this certificate for instruction, says: "Under the circumstances, I think it would be a hardship upon the parties to put them to the expense of marshaling their evidence when the right to maintain the bill is placed in doubt.

It would be the prudent course to just determine the right to maintain the bill on the facts stated, and in that view I have concluded *pro forma* to sustain the demurrer and dismiss the bill and the complaint. The appellant here, may appeal, etc. The court may be able to reconcile the two cases (*United States* v. *Throckmorton*, 98 U. S., 61, and *Marshall* v. *Holmes*, 141 U. S., 598), or if unable so to do, can certify the question to the Supreme court for its solution." Accordingly an appeal was taken to the Circuit court of Appeals, which in view of the two cases referred to, this court was in doubt, and desires advice and instruction upon the following question:

Question.

Whether, (assuming the bill of complaint to be in other respects sufficient), the alleged false swearing and perjury in the respective answers of the defendants in the original suit in the Superior court of the county of Cook, State of Illinois, are in the law available in this suit as ground for a decree, setting aside and declaring void the decree so rendered in the Superior court of the county of Cook.

(Signed) WILLIAM A. WOODS,
Circuit Judge.

(Signed) JOHN H. BAKER,
District Judge.

Public interest demands a speedy and immediate trial, inasmuch as since the decision of this case and the report in the Federal Reporter of the opinion of Judge Jenkins, several suits both in Chicago, St. Paul and St. Louis are delayed until this case is determined by this court, on answering the question. The cause of justice demands that the appellant and appellee may both marshal their proofs before, by lapse of time, the witnesses may and will be in many instances beyond their reach. The record also shows that a valuable property is by injunction tied up until this litigation shall terminate.

Wherefore, and to the end that there may be a speedy and early determination of this certificate, and an appeal, the appellant prays that the said cause may be advanced upon the calendar, and at an early date set down for argument, and if necessary, upon printed record and briefs, pursuant to the statutes of the United States (Revised Statutes, § 949), and the rules (Rule 26) and the practice of this court.

ROBERT RAE,
Counsel for Appellant.

IN THE

Supreme Court of the United States.

FOR THE OCTOBER TERM, 1895.

WILLIAM GRAVER, *Appellant*,
vs.
BENJAMIN C. FAUROT, *Appellee.*

No. 179.

Appeal from the Circuit Court of Appeals for the Seventh Judicial Circuit.

TO FRANK O. LOWDEN, ESQ.,
FRANK L. WEAN, ESQ.,
Of Counsel for Appellee,

Chicago, Ills.

SIR: Please take notice that on Monday, the 25th day of November, 1895, at the opening of the court, or as soon thereafter as Counsel can be heard, the motion, of which the annexed is a copy, will be submitted to the Supreme Court of the United States, for the decision of the said court thereon.

Dated at Chicago, this 15th day of November, 1895.

ROBERT RAE,
Counsel for Appellant.

Received a copy of the foregoing motion and notice, at Chicago, Illinois, this 15th day of November, 1895.

FRANK L. WEAN.
FRANK O. LOWDEN.

FILED
JAMES McKENNEY
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1895.

No. 779.

On Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

WILLIAM GRAVER, Appellant,

vs.

BENJAMIN C. FAUROT, Appellee.

BRIEF FOR APPELLANT

. . BY . .

ROBERT RAE AND
HENRY S. MONROE.

Barnard & Miller, Law Printers, 44 & 46 LaSalle St.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

No. 779.

WILLIAM GRAVER,
Appellant,
vs.
BENJAMIN C. FAUROT,
Appellee.

On Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF APPELLANT

BY
ROBERT RAE.

This cause came on for hearing in the United States Circuit Court of Appeals for the Seventh circuit at the October term A. D., 1894, on an appeal from a decree of dismissal of a bill in equity upon a demurrer filed thereto in the Circuit court of the United States for the Northern district of Illinois, the learned chancellor who heard the case being unable to reconcile the case of *Marshall* v. *Holmes*, (141 U. S., 598), cited to sustain the bill, and the case of the *U. S.* v. *Throckmorton*, (98 U. S. 61), cited to sustain the demurrer.

In this dilemma the learned chancellor decided *pro forma* or the demurrer and dismissed the bill. In doing so he said:

"Under the circumstances I think it would be a hard-
"ship upon the parties to put them to the expense of
"marshaling their evidence when the right to maintain
"the bill is thus placed in doubt. * * * In that view
"I have decided *pro forma* to sustain the demurrer, and
"dismiss the bill, and the complainant by appeal to the
"Court of Appeals, may speedily have the question de-
"termined, in advance of an issue upon the merits.
"That court may, perhaps, be able to reconcile the two
"cases referred to, or, if unable so to do, can certify the
"question to the Supreme court for its solution."

The case was so appealed, but was not heard by a full bench, and the United States Court of Appeals says: "In view of the decisions of the Supreme Court of the "United States in the cases of *U. S.* v. *Throckmorton*, "and *Marshall* v. *Holmes*, this court is in doubt, touch-"ing the case in hand, and desires advice and instruction "upon the following question.

QUESTION.

Whether (assuming the bill of complaint to be in other respects sufficient) the alleged false swearing and perjury in the respective answers of the defendants in the original suit in the Superior court of County of Cook, Illinois, are, in the law, available in this suit as ground for a decree setting aside and declaring void the decree so rendered in the Superior court of the County of Cook? (Rec., 28, folio 56.)

It is upon this certificate that the case finds its way before this court.

Abstract of Certified Facts.

The original bill and its statements are made part of the bill. (Rec., 13; Fol. 25.)

The bill states that the complaint on the first day of June, 1877, was engaged in a small manufacturing business at Lima, in the State of Ohio, and was worth about the sum of fifteen thousand dollars; that he went to Ohio for the purpose of erecting tank works, and there formed the acquaintance of Bailey, and through him, Faurot; that Faurot is the president of the bank at Lima, and that he soon became on friendly and confidential relations with him, and had daily and frequent consultations with Faurot as to his affairs, and that he made the bank of which Faurot was president his bank of deposit (Rec., 13; Fol. 26); that Faurot, from the time that Graver arrived in the city of Lima until he discovered the fraud that was perpetrated upon him in the sale of the Edwards Oil Burners' stock, was his banker and trusted adviser, and that said Faurot, while such banker and trusted adviser, and occupying confidential and fiducial relations with him, as such banker, stated to him when applied to for advice as to whether he should become the purchaser of the Edwards Oil Burners' stock, a stock that had been offered to him for sale by one Bailey; that Faurot represented that said stock was of great value and likely to become still more so, when the said Faurot knew, as treasurer of the said Edwards Oil Burner Company, that said company had no capital, and was practically insolvent and worthless (Rec., 13; Fol. 26); that at the time he was about to purchase said stock from said Bailey, he came to see Faurot as a friend and as his adviser, and said he would rely upon whatever

he might say regarding the value of the stock without further inquiry (Rec., 14, 27; Fol. 28); Faurot represented that your orator could rely implicitly on the statements made by Bailey, and he repeated to him the statements of said Bailey, and said that he himself would investigate the matter, as he had promised Graver that he would do, as he had some interest in the company and intended to purchase a further block of the stock, and fraudulently concealed from Graver that said stock, which Bailey represented to be treasury stock, belonging to said company, was stock which he and Bailey owned in partnership and for which they paid the sum of eighteen hundred dollars on time, and by falsely concealing from him the fact that the company had not consented to sell said stock for sixty cent. on the dollar, or any other sum, but the same was the said Faurot and Bailey's own stock and with which the company had nothing to do (Rec., 14; Fol. 27); that before going to Faurot to inquire the value of the stock Bailey, before purchasing the stock from Edwards, constantly puffed said stock to your orator and tried to impress upon him the desirability of possessing shares in said company; said Bailey represented that the company was doing a large and prosperous business and that it had formed connections with the officers of the Standard Oil Company, by which the said company would become a prosperous and wealthy concern (Rec., 14; Fol., 28); that said Graver was so impressed by Bailey's statements and the confidence he had in Bailey because of the relations between Bailey and Faurot, and because he was his banker, and by the representations of Faurot as to the character of Bailey, that he expressed a willingness to become owner of some of the shares of said stock (Rec.,

14; Fol. 28); that thereupon Bailey promised to go to the company and see if he could secure five hundred shares of said stock at sixty cents on the dollar, but said that the same must be kept quiet, and neither Mr. Rockefeller nor any of the other officers of said Standard Oil Company interested in the said company should be made aware of the fact, as the company did not want it known that its stock had been sold at so low a price as sixty cents on the dollar per share, and advised Graver to keep quiet about it (Rec., 14; Fol. 28); that in June, 1887, Bailey reported he had obtained the consent of said company to sell to him its treasury stock, 500 shares, for the sum of $30,000, and to takes his notes therefor (Rec., 14; Fol. 28); that Graver went to Faurot and laid the matter before him as to the advisability of buying said stock, and as to the condition of said company and the value of the stock, and also as to the character of Bailey (Rec., 15; Fol. the said company (Rec., 15; Fol. 29); that Bailey also represented that the money to be received for said stock was to be used for the benefit of said company, and concealed the fact that the company did not own said stock and had no interest in it; that said Bailey, instead of going to the said company, went to one E. A. Edwards, who was the owner of said stock and who had received his pay for his patents in said stock, obtained from said Edwards five hundred shares of said stock at the sum of $3.50 per share, and gave his note for the same, agreeing to procure Faurot's discount on said note; that Bailey obtained said stock, returned to said complainant with said stock and transferred the same to him, and that complainant made and delivered to said Bailey two judgment notes for $10,000 each and two judgment notes for $5,000 each, making a total of $30,000, said Bailey at this time

well knowing said stock was worthless (Rec., 15; Fol. 29); that Bailey discouraged him from consulting Rockefeller or Squires in reference to the stock and from making inquiries elsewhere (Rec., 15; Fol. 30); that Bailey promised to hold said notes in his possession and not to endorse or transfer the notes, and that Graver should not be called upon to pay them until he should be able to realize on said stock or a part of the same.

That complainant, about the 1st of September, 1888, discovered that the stock was worthless, and that he had been designedly swindled out of his notes and money through the fraudulent federation of said Bailey and Faurot; that thereupon your orator tendered back three hundred shares of said stock, it being the only amount of said stock he held, the remainder being with said Bailey and Faurot as collateral security for the unpaid notes, and demanded his notes, money and property returned (Rec., 17; Fol. 34); that said Bailey and Faurot refused to return the same, and thereupon he filed a bill in equity on September 18, 1888, in the Superior court of Cook county, alleging these facts (Rec., 17; Fol. 34); that said bill is incorporated in this bill and is made part of this bill (Rec., 13; Fol. 25), and added, in addition thereto, that as soon as said notes were obtained from him by the said Bailey, he went to Faurot, who had his bank discount the notes, and divided the proceeds between them, and that the said Bailey and Faurot were interested together in the defrauding and swindling the complainant, and before Faurot cashed the said notes of said Bailey for the purchase of said stock from said Edwards, and before he received the said notes of complainant, an arrangement had been made between said Bailey and Faurot (Rec., 15; Fol. 29) that they were to divide

whatever might be realized on complainant's notes; that before your orator had ascertained the facts in the case, and before he learned of the worthlessness of the stock, he paid on said notes the sum of $10,000, and $5,000 in real estate, besides interest to the amount of $2,800, and that Faurot held said notes and the notes given in renewal, one of which was for $10,000, not yet matured, and complainant was in danger that said notes might be transferred to a *bona fide* purchaser. (Rec., 3; Fol. 6.)

The bill further sets forth that Graver commenced a suit against said Faurot and Bailey on the law side of the court, in deceit, to recover the damages he had sustained in the premises, and that neither Faurot nor Bailey are worth the amount of the damages he might recover in said case, and prays an injunction against said Faurot enjoining him from endorsing and disposing of the unmatured notes. (Rec., 4; Fol. 8.)

To the original bill the defendants appear and answer under oath. The answers are substantially the same in both cases. (Rec., 5; Fol. 9.) Faurot sets up in his answer that he had no partnership or intimacy with Bailey, except such as is usual between business men and business acquaintances (Rec., 5; Fol. 9, 10); denies all knowledge of representations and promises made by said Bailey to complainant (Rec., 5, 9; Fol. 10); has no knowledge of the price paid by Graver for said stock, or from whom said Bailey procured said stock, or that any of the money was paid from the avails of the said stock to Edwards (Rec., 5; Fol. 10; denies that he was interested or is interested, or agreed to be interested in any manner directly or indirectly in the stock transaction, or in the proceeds of the stock transaction narrated in said bill, between said Bailey and complainant (Rec., 5; Fol.

10); that all defendants knew of the matters and transactions stated in the bill is, that said Bailey was a depositor in the Lima National Bank, of which Faurot was president; that he applied in the ordinary course of business to get the notes of the complainant discounted, and took 500 shares of stock as collateral security; that all this was done by the financial committee of the bank, they believing said stock to be worth $60 or $70 per share, and so believing directed the discount to be made. (Rec., 5, 6; Fol. 10.)

It admits that Graver paid the first $10,000 due on said notes, and when the second $10,000 note became due, 29); that Faurot assured him that the statements of the said Bailey could be relied upon and that the stock was very valuable and would become more so from time to time, and advised your orator to buy the said stock from obtained an extension from the bank, and had the amount divided into two notes of $5,000 each; when the first note became due Graver paid it; when the second of the said $5,000 notes became due, Graver asked for further extension, and the note was split into two notes of $2,500 each, payable sixty days after date; that about the time the first of the $2,500 notes became due, Graver met Faurot and asked him for an extension, which Faurot promised to give, but the financial committee of the bank declined to grant the desired extension, and Faurot being a man of large means, and feeling kindly towards the complainant, stated he had given his promise to Graver that he should have such extension, and that he proposed to keep his word; that thereupon the bank assigned the $2,500 note to Faurot, and he paid the bank the two $2,500 notes, and he is now holding these $2,500 notes which are still due and unpaid (Rec., 6;

Fol. 11); denies he was advised as to what offers of surrender of stock to, or demands for the delivery of said stock, or for money paid on them, may have been made upon said Bailey, and denies that any such offer or demand was made to him (Rec., 6; Fol. 10); claims he is worth $500,000 over and above his liabilities. (Rec., 6; Fol. 12.)

The present bill then alleges that an injunction was granted according to the prayer of the bill (Rec. 9; Fol. 17, 18); that afterwards the motion was made to dissolve the injunction, and the case was heard on bill and answer, and no other testimony, and that the injunction was dissolved (Rec., 9; Fol. 17, 18); that at the hearing of said motion the court informed your orator that by the answers it appeared Faurot was worth $500,000 clear of all debts and liabilities; and that he had a full, complete and perfect remedy at law against the defendants. (Rec., 9; Fol. 18.)

That at the time of filing his said original bill he was absolutely certain as to the matters and things set forth in said bill that they were true, and that he had been wronged out of a large sum of money; that the matters and things set forth in said bill tending to establish the fraud and iniquity of the defendants, were matters that must necessarily in a great measure lie wholly within the knowledge of the defendants; that the wrong being that of conspiracy to cheat and defraud, the material evidence must of necessity be and was wholly within the knowledge and under the control of the respondents, and that Graver was wholly ignorant of the facts; that he could not obtain any witness or witnesses, or any document or documents which would tend to establish the fraud complained of in his said bill, or disprove the statements

made in said respective answers, and for that reason was wholly unable to support by legal and competent proof the allegations of his said bill, although he had made every effort to obtain such evidence. (Rec., 9, 10; Fol. 18, 19.)

The present bill further states that it was solely by reason of the *suppression* of testimony on the part of the said respondents, and by absolute falsehood and perjury on their part in the allegations contained in their respective answers, that the bill was dismissed for want of equity, and the complainant was *not permitted to obtain* competent evidence to establish the allegations of his said bill (Rec., 10; Fol. 19); that after said injunction had been dissolved, the said defendants, *without notice* to said complainant, and upon their motion, caused the said bill to be dismissed on THE 8TH DAY OF JULY, 1889, and caused a decree to be entered thereon, *dismissing complainant's bill* FOR WANT OF EQUITY (Rec., 10; Fol. 20); that neither the complainant nor his solicitor were present at the hearing of said case, if any were had, and upon information and belief charges *that no evidence* was had in said case at the final hearing thereof, or argument made by counsel, and the said matter was disposed of *ex parte*, and without notice as aforesaid. (Rec., 10, Fol. 20.)

That at the May term, 1891, Faurot commenced an action against the complainant in the United States Circuit court of the Northern district of Illinois, upon the two promissory notes of $5,000 each, dated Lima, Ohio, June 27, 1888 (Rec., 10, 11; Fol. 20, 21); that Graver set up a special plea to the declaration setting up the failure of consideration, and the fraud practiced upon him by said Faurot and Bailey, as set up in said bill of

complaint (Rec., 10; Fol. 20, 21); that afterwards said Faurot filed a replication to said pleas, setting up the dismissal of said original bill for want of equity as *res adjudicata* (Rec., 11; Fol. 22), and the bill alleges that at the trial of said cause, Faurot intends to offer said decree in equity as estoppel and as *res adjudicata* to the matters and things set up in said Graver's special pleas to said action. (Rec., 11; Fol. 22.)

The bill further sets up that the case being set down for hearing on the 8th day of January, 1894, Graver attempted to obtain witnesses for the purpose of establishing the matters set up in the said pleas, which are the same matters and things set up in his said bill of complaint, and to which pleas a replication of dismissal is pleaded as an estoppel, and in doing so he discovered for the first time that he was able to establish the averments of said bill, and able to establish every material allegation of said bill, and that the matters and things set up in the said answers filed by the said defendants respectively, to said bill, were clear and absolute perjury and false swearing, and the defendants well knew at the time they filed their said answers that every material fact set up in their said answers were untrue. (Rec., 11; Fol. 22.)

The bill sets up that newly discovered evidence obtained by means of a publication of the annual report of the comptroller of the currency, to the second session of the fifty-second Congress of the United States, under date of December 5, 1892, which first came unto your orator's notice about January 8, 1864 (Rec., 12; Fol. 23, 24); that said report gave said Graver an opportunity that enabled him to get at the books of said bank, and ascertain therefrom that said Faurot and Bailey were the owners of the 500 shares of stock in the Edwards Oil

Burner Company, which were sold by the said Bailey to your orator for the sum of $30,000, and the said Faurot and Bailey, after having ascertained that Graver was willing to purchase said 500 shares of stock at said price, by a conspiracy between them and false representations to Graver, representing said stock to be treasury stock of said corporation, to be used in the promotion of said corporation in its business, and as stock belonging to said corporation for that purpose, and by falsely representing that said stock was of great value, and that none of it had been sold for less than its par value, which was $100 per share, *and by means of the statements made in said bill of complaint, which is made part of this bill,* said Faurot and Bailey formed a copartnership to buy said stock of one Edwards, who was the owner of said stock, and had received said stock in pay for certain patents intended to be used by said Edwards Oil Burner Company; said Bailey purchased said stock, which was then worthless and of no market value, from said Edwards on the 27th day of January, 1887, for the sum practically of $1,800, and gave his note therefor in such a manner that in case your orator should buy said stock, which said Faurot and Bailey were then certain he would do, $1,800 should be paid out of the part of the $30,000 paid by Graver to them to said Edwards. (Rec., 12; Fol. 23, 24.)

The bill avers that said eighteen hundred dollars was paid out of the funds obtained from Graver as part of the thirty thousand dollars, and that on obtaining said stock from said Edwards the said five hundred shares were afterwards sold to Graver for the sum of thirty thousand dollars, and the profits were by said prior fraudulent agreement between Faurot and Bailey, divided share and

share alike between them; and that the books of said bank by their entries show that said notes were discounted by said Lima National Bank, and how the said sums of money paid by Graver from time to time on said stock were by virtue of said conspiracy and fraudulent agreement, divided between the said Faurot and the said Bailey. (Rec., 13; Fol. 25.)

The bill further avers that Graver has now discovered and is able to prove by said books of the said bank, and by the officers of said bank, and by instruments in writing that the said Faurot and Bailey were the owners of said stock at the time the stock was purchased from the said Edwards, and at the time it was offered to him, and they, among themselves, agreed to divide whatever profit they might obtain from the sale of said stock to him, well knowing at the time they sold the said stock that it was worthless, and that the representations made by them were false and dishonest, and the said Bailey was used only as a part of a scheme to entrap him into the desire to purchase said stock, and that said Bailey and Faurot were both engaged as confederates in selling to him said stock, and fraudulently obtaining from him the said promissory notes therefor, whereby he was wholly defrauded out of every cent that he paid upon said notes, and if he is compelled to pay the balance of said notes he will also suffer a loss to that extent.

The original bill to which these answers were filed did not waive the oath, and the defendants were required to answer under oath the matters and things set up in the bill. (Rec., 4; Fol. 8.)

The above abstract of the bill and answer may be further abstracted, so that the attention of the court is called to the substance of the bill, and the answer thereto. The bill states in short (Rec., 2; Fol. 3):

(1.) That Faurot was the confidential banker of the complainant and that his bank was the bank of deposit of the complainant; that Faurot was not only his banker, but his confidential adviser, and occupied confidential and fiduciary relations with him, as his banker. (Rec., 13; 14; Fol. 26.)

(2.) That in the purchase of the worthless stock of the Edwards Oil Burner Company, he was advised by Faurot that he could rely implicitly upon the statements of Bailey as to the value of the stock, and that so relying he purchased 500 shares of the stock for $30,000. (Rec., 14; Fol. 25.)

(3.) That the stock at the time was owned by Faurot and Bailey, and that it was purchased by them for a nominal sum of money to fraudulently unload upon the complainant. (Rec., 15; Fol. 29.)

(4.) That upon the payment of his money the proceeds were fraudulently divided between Faurot and Bailey, share and share alike. (Rec., 15; Fol. 29.)

(5.) That he paid some $15,000, together with $3,000 interest on said stock, and his notes were outstanding for the balance. (Rec., 16; Fol. 31.)

(6.) That as soon as he discovered the fraud he tendered back the stock and demanded back his money and a re-delivery of his notes. (Rec., 7; Fol. 8.)

(7.) That he filed a bill in equity in the Superior court of Cook county against Faurot and Bailey, praying an injunction against said Faurot, enjoining him from endorsing and disposing of the notes, and to recover, in an account, the money paid on the fraudulent transaction. An injunction issued. (Rec., 1; Fol. 2.)

(8.) That the defendant appeared in answer under oath and denied every material allegation in the bill, and moved to dissolve the injunction on such answers. (Rec., 19; Fol. 17.)

(9.) That the injunction was heard on the bill and answer alone, and no other testimony, and the injunction was dissolved on the grounds, the bill alleges (Rec., 9, Fol. 17), that as the defendant, Faurot, swore he was worth $500,000, Graver had an adequate remedy at law. (Rec., 9, Fol. 18.)

It is further alleged in the bill that the matters and things set forth in said bill were matters that necessarily in a great measure lie wholly within the knowledge of the defendants, that the wrong being that of conspiracy to cheat and defraud, the material evidence must of necessity be wholly within the knowledge and control of the respondents; that Graver was wholly ignorant of the facts that he could obtain any witness or witnesses, or any document or documents which would tend to establish the fraud complained of in the bill, or disprove the statements made in the respondents' answer. (Rec., 9, 10, Fol. 18.)

(10.) That this was solely by reason of the suppression of testimony on the part of the respondents, and by absolute falsehood and perjury on their part in the allegations contained in their respective answers. (Rec., 9, 10, Fol. 18.)

(11.) That the bill and answer were set down by the defendants for hearing without notice to the complainants, and upon their motion the bill was dismissed for want of equity (Rec., 15 and 16, Fol. 20) without any hearing, without evidence, without the presence of the

complainant's counsel or himself, and without notice thereof. (Rec., 10, Fols. 20 and 24.)

(12.) That afterwards he discovered for the first time that he was able to establish the averments of his bill, and that the matters in the answers were clear and absolute perjury, and the defendants knew it at the time they filed their answers. (Rec., 12, Fol. 23.)

This bill was thereupon filed to set aside said decree, in the court in which it was obtained. The bill sets forth the nature of the newly discovered evidence, and how it was obtained (Rec., 12, Fol. 23), and that the evidence consists in written documents and entries in the bank books of the Lima National Bank, together with parol testimony, which these writings corroborate. The evidence is set forth, which sustains these charges, but not fully.

The facts, if established as set out in the bill, establish a case of gross and almost unprecedented fraud.

ARGUMENT.

The original bill called for answer under oath, and therefore the contents of the answer must be regarded as representations, and if false, as misrepresentations to the court.

In the case of *Field* v. *Flanders*, (40 Ill., 474), which was a bill to set aside a decree on the grounds of fraud in the obtaining, the court said: "The law does not re- "quire a party to a suit to disclose facts within his "knowledge beneficial to the other party, *unless required* "*to discover by answer, in the bill.*"

The significancy and justness of this qualification to the general proposition, stated in the above quotation, when applied to a proceeding in chancery, must at once compel the assent of the legal profession.

In a court where "Honesty," "Equity" and "Con- "science" were the shibboleths by which the Chancellor sustained his jurisdiction against the judges of the common law courts, in the reign of Henry VIII., and in the reign of Elizabeth, headed by Lord Coke, it goes without saying, that one of the controlling reasons, (except in cases of uses), if not *the* controlling reason, for the maintenance of this useful jurisdiction was, that the Chancellor could explore the conscience of a defendant by a personal examination had before the court.

Thus we find it stated in Mr. Spence's work on Equitable Jurisdiction, that "Before the Chancellor, disputed "facts might be established by the personal examination, "on oath, of the party against whom any complaint was "made—an advantage which could be obtained in no "other court."

This examination was anciently conducted personally before the Chancellor, and by questions put by him to the defendant.

In a case reported, it is said "Lord K. Bridgman took "occasion, when he could, to examine the parties in "court."

North's Life of Gildford, i., 219.

In note c to I. Spence, Eq. Jurs., p. 370, it is said, "In Elizabeth's time it was very common. Thus par- "ties were called upon in open court to say whether "they intended to do as the Act suggested." (Reg. Lib. B. 1570, fo. 383.)

Again, it is said by the same learned author (page 372), "When the defendant appeared, he was, according to "the original constitution of the court, examined person- "ally before the Chancellor, or latterly, perhaps, more "frequently, before the Master of the Rolls."

In our time and at the time when the nine orderly parts of a bill in equity were formulated, the complainant filed interrogatories for the defendant to answer under oath, and while they were for convenience put in this way, the questions and answers, nevertheless, in theory, are those of the Chancellor. The answer is the act of the defendant himself made to the court, and if feloniously made through false swearing or the suppression of a material fact called for by the court, the defendant is guilty of perjury and also of contempt, as being guilty of an imposition upon the court and not upon the parties. And this brings it within the rule that a court will set aside a decree obtained by the successful party through the means of any imposition practiced upon the court.

The ancient jurisdiction of the Chancellor enabled him to punish the defendant for perjury, but this jurisdiction is, in England, by act of Parliament abolished.

In 1172 there is the record of a case in Tothill where this passage occurs: "A person sentenced in this court "for forgery," and again "this court appears to have "been considered the proper tribunal for subornation of "witnesses and the like," when connected with a question as to property; when not connected with such a question the court of Star Chamber generally took jurisdiction.

Under the statute of 5 Eliz., Chap. 9, Sec. 15, which gave authority to judges of different courts to hold jurisdiction as to perjury committed in their respective courts, the court of chancery used to take cognizance of perjury committed there in answers to questions in examining the defendant under oath.

English bills for this purpose are also mentioned by Tothill, pages 178, 222.

The punishment in chancery for perjury was somewhat quaint. In Reg. Lib. A. 1573, fo. 251, is found an order, that a person who had been convicted of having committed perjury in a proceeding in the court of chancery, should go round Westminster Hall with a paper on his head bearing the inscription, "FOR WILFUL PERJURY," and should then stand in the pillory and afterwards be taken back to the Fleet, there to remain until further ordered.

This punishment only vindicated the offense against the Commonwealth like a conviction before a court of Oyer and Terminer, but did not vindicate the outraged complainant. In a court of chancery, where *restitutio*

in integrum is a fundamental maxim, the court would be wanting in justness if it did not set aside the decree which was obtained by the perjury of the defendant in his answers put by the court.

It is contrary to equity as it is to the law, that one may be merely punished and still retain the effects for which he did the offense.

In a court of chancery,

> "There is no shuffling, there the action lies
> In his true nature; and we ourselves compelled,
> Even to the teeth and forehead of our faults,
> To give in evidence."

In case this evidence is false and made to the court, and the guilty party has obtained anything by it, the plainest justice requires that he should make restitution. If the wicked prize is a decree in equity, it should be at once set aside, so soon as the guilt appears.

Thus we find that at a very early date, 1590, in Reg. Lib. A., a case where the matter in controversy was, whether a decree that had been made was binding on the parties in the suit, and the answer was "that the de- "cree was very just and grounded upon very good and sufficient causes and reasons," which could not be said if the record had been as the one at bar. See Lord Elsmere's Treatise, p. 37.

Since the reign of Henry VI we find bills seeking relief on the ground of fraud in obtaining judgments in courts of law, and there are instances as early as Car. I of relief given on the ground of fraud against an award and against a fine or recovery obtained by fraud, and the decree was, in effect, a *restitutio in integrum.*

Nelson, C. R. VI.
Tuth., 164.

Baker v. *Pritchard*, 2 Atk., 390.

See also

Chancery Vindicated, I Rep. Ch., 11.

As to granting this kind of relief in cases of decrees obtained by the perjury of the defendant himself as an imposition upon the court, we in the following pages will endeavor to discuss.

We may be permitted *in limine* to ask, in the language of Mr. George A. Black, a distinguished member of the New York bar, in a brief filed in this honorable court on a cognate subject. "Shall it be said that the "courts of the United States, at this date in the era of "civilization, refuse to give relief for frauds perpetrated "*on it*, while those perpetrated on parties *misleading* "*them* are grounds therefor?"

The question raised by the demurrer to the bill and the question raised and submitted to this court is:

(1.) Whether a bill will be maintained in equity to set aside a decree obtained by fraud in the same court where the decree was originally obtained by reason of the suppression of testimony on the part of the respondents, by absolute falsehood and perjury on their part in their answers, which answers were required to be made under oath.

(2.) Whether a bill will be maintained in equity to set aside a decree obtained by fraud in the same court, where it appears that the decree was obtained without a hearing and without any actual contest and trial, and in the absence of the complainant and his counsel.

(3.) Whether to sustain the bill, newly discovered evidence, consisting of written documents and writings, which establish the fraud, and which were not the sub-

ject of inquiry before the court, and on which there was no actual trial and judicial determination, can be offered for the purposes of setting aside such a decree in a case where the complainant is in no way to blame for not discovering the evidence at the time the decree was rendered.

Bills affecting decrees, either to set aside or modify them, are for matters:

1. Error apparent on the record.

2. Upon the ground of new matter subsequently discovered.

3. Upon the ground of fraud.

Barton's Suit in Eq. Pr. in U. S. Cts., 157.
Cooper's Eq. Pl., 96.

The meaning of new matter subsequently discovered, or what is generally known as newly-discovered evidence, is that evidence which, if known to the parties at the time of trial, or could have been known by diligence, would, if offered at the time of hearing, change the result.

This is newly-discovered evidence, and has no relation to fraud. Its discovery may be as much of a surprise to the successful party as to the party who now seeks to defeat him. Both may be innocent of any fraud, and yet upon the discovery of this new matter, within proper limitations, the court will, upon application, permit a party to file a bill to establish his right. In such cases the court must be applied to to grant leave to file a bill, in order that the judge should be satisfied that at least a *prima facie* case for relief has been presented: 1. Of

the innocent ignorance of the party. 2. That it is newly discovered. 3. That it is so material as, when established, it will unanswered change the decree.

The decree itself is considered of so solemn a character that, before it is permitted to have proceedings to set it aside and a retrial granted, the court must be satisfied that there is a good cause shown to directly attack it.

The third and last cause for setting aside a decree is that it is obtained by fraud. This must be established by evidence, and this evidence must not have been known to the party affected by it at the time of the trial and contest. Otherwise it is his own laches that has permitted the court to be imposed on, and he is to that extent a *particeps criminis*, and is justly estopped. So that the evidence which establishes the fraud must be newly discovered, but the bill which alleges it is not a bill filed on account of newly-discovered evidence to support either party in the issue tried, in the sense this is used in chancery practice, but is known as an original bill in the nature of a bill of review to set aside a judgment or a decree obtained by fraud.

Herman on Estoppel tells us, section 398, that the issue must have been false, so that the obtaining of the judgment is fraudulent, and then goes on to say: "It "is essential that there should have been no contest as "to the validity of the cause of action, for if this has "been litigated it is a question merged in the judgment, "which is not to be reviewed; but in order to render "fraud a cause by which a judgment may be avoided, "the party must avail himself of the right as soon as he "has discovered the fraud." At section 404 he says:

"It is not enough that the matter was in issue, it must "be determined."

The doctrine that a bill may be filed as an original bill in the nature of a bill of review to set aside a bill obtained by fraud is not questioned, but it is not so plain that this fraud must be extrinsic or collateral to the matter tried, and not a fraud which was an issue in the former suit. That the courts have sometimes decided that they will not retry a case on account of perjury or forgery offered in evidence during the litigation of a case, and offered to sustain a disputed issue, is not questioned, though perhaps stated a little too broadly, but the Supreme court of the State of Illinois has established a *less technical rule in reference to the powers of a court of equity to set aside the decree of the courts of Illinois, and this bill was filed in just such a court*, and the Supreme court of the United States has also in its later decisions, adopted the same modification of the rule, as we shall presently see.

In the case of *Field* v. *Flanders* (40 Ill., 474), before quoted, the court says: "The law does not require a "party to a suit to disclose facts within his knowledge "beneficial to the other party, *unless required to dis-* "*cover by answer to a bill.*"

While the defendants are not bound to disclose facts favorable to the complainant, yet it would be a mischievous doctrine to hold that a false and fraudulent misrepresentation made to deceive the court may not be a ground for setting aside a decree obtained by such misrepresentation and perjury. Concealment and mere silence may not be enough, but misrepresentation, amounting to perjury, in forming the issue, whether the answer

calls for the matter or not, so misrepresented, must always be regarded by the court as an offense against it and against justice.

The court in *Field* v. *Flanders* goes on further to say that "the bill alleges that the defendant, by fraud, covin "and collusion, had procured the judgment and decree. "This is of that species of fraud for which a court of "equity will afford relief." Is it not fraud and covin and collusion for the complainants or defendants to make fraudulent representations, and by falsely swearing to these representations in their pleadings, obtain a decree?

In *Fletcher* v. *The People* (117 Ill., 184), the court says: "The general rule is that a new trial will not be "granted merely for the purpose of admitting cumula- "tive evidence or to impeach a witness.

"The rule, however, is subject to exceptions (*Cochran* "v. *Ammon et ux.*, 16 Ill., 316), and in *Fabrilous* v. "*Cook*, 3 Burrows, 1,771, Lord Mansfield granted a "new trial because of the discovery, subsequent to the "trial, that the judgment was rendered upon the testi- "mony of the witness whose testimony was *suborned*. "In *Peagram* v. *King*, 2 Hawks, 605 (11th Am. Dec., "793), a court of equity decreed a new trial at law be- "cause of the discovery subsequent to the trial that the "judgment was rendered upon perjured evidence. In "*Wright* v. *The State*, 44 Tex., 642, where the princi- "pal witness for the state, in an affidavit, stated that "her evidence given on the trial was incorrect, and "her mother, by affidavit, stated that she was unreli- "able, it was held to be grounds for a new trial as *sub-* "*sequently discovered evidence*. So in *G. F. M. C. Co.* "v. *Mathers*, 5th N. H., it was held sufficient ground "for a new trial, that one of the witnesses on whose ev-

" idence the verdict was rendered, was convicted of per-
" jury in his testimony, on his own confession. In *Du-*
" *rant* v. *Ashmore*, 2d Rich. L., 184, a new trial was
" granted on after discovered written evidence, which
" might have affected the witness' credit with a jury.
" And to the same effect is *Ecfort* v *Descombres & Co.*,
" 1st Mil., 70. It cannot be objected to, granting a
" motion for a new trial on the ground of newly discov-
" ered evidence that such evidence is cumulative, if it is
" of a different kind or character from that adduced on
" the trial."

In *Brown* v. *Luchrs*, 95 Ill., 195–7, WALKER, C. J., said:

" If, however, a party has employed every effort in
" his power to discover evidence and fails, when after-
" wards discovered, courts of equity treat this *as an*
" *accident*, and will, when satisfied that such evidence
" would have produced a different result, and the judg-
" ment is unjust and should not be paid, grant a new trial,
" but all of these requirements must concur before such
" relief will be granted. It must appear that the judg-
" ment is wrong, that the knowledge of the evidence
" has come to the complainant after the trial, and that
" he had exhausted all reasonable means and efforts to
" discover it before the trial, and when introduced on a
" new trial it will produce a different result. See
" *Holmes* v. *Stateler*, 57 Ill., 209. The same rule has
" been announced in other cases, and is the well recog-
" nized doctrine of the court."

Wharton on Criminal Practice and Pleading, (8th Ed.) Sec. 870.

Long v. *The State*, 54 Ga., 564.

Guyott v. *Butts*, 4 Wend., 579.

The rule is different where there had been a full trial on issue joined, and evidence had been received pro and con.

In the case of *G. & S. W. R. R. Co.* v. *Ennor*, 116 Ill., 62, the judgment, which by the bill was sought to be set aside, was one obtained after a full trial, and evidence had been offered and heard, and the court says: "The defendant appeared and defended against the suit "by his attorney. All that was needed to avoid the re- "covery of the judgment was for the defendant to stand "upon his legal rights and insist upon the cause of action "being established in a legal mode. Instead of this be- "ing done there was produced incompetent testimony, "and the defendant did not object to it, when, if he "had stood upon his legal rights, no remedy could be "had." Notwithstanding this, the court would not permit the judgment creditor to take the fruits of his judgment *without doing equity between himself and the defendant.*

In the case at bar not only does the appellee, Faurot, seek to retain the fruits of his iniquity already obtained, but he is reaching out for more, and asks the law side of this court to assist him to obtain through this decree that which the appellees admit by the demurrer to be unjust, and also invoke the validity of the decree, upon the technical grounds, that the admitted fraud and false swearing, cannot be relied upon on account of a decree obtained on it without hearing on the merits.

The Rule in the Fderal Courts.

The case of *Marshall* v. *Holmes*, (141 U. S., 589) is the latest case in the Supreme court on this subject. It is a case very much on all fours with the case at bar as to the manner in which it got into the United States courts. It seemed to the Circuit court to be inconsistent with the case of the *U. S.* v. *Throckmorton*, and the cases that follow in its wake. This is so, unless this case receives the interpretation given to it by appellant and not that given to it by appellee. It was a bill filed in the State court by a citizen of New York, representing that the defendant had obtained judgments against her amounting to over $3,000. The bill alleged that all the judgments complained of were obtained on false testimony as to the existence of a document, which, if it ever had any such, was a forgery, and that equity and good conscience required that they be annulled and avoided. The bill went on to show that at the trial the defendant introduced evidence of the existence of a letter from the complainant to the defendant, authorizing him, etc., that upon such evidence so offered, and of the existence of which the complainant could not possibly be aware, and of which she had no knowledge until subsequent to the trial, judgment was rendered against her in said suit. Petition then goes on to say that the pretended letter, *if it ever had an existence*, which she denies, *was a false and forged document, not written and not signed by her, and that the testimony of the defendant as to the existence of said pretended letter is false, and in pursuance of a conspiracy to defraud her, or that said pretended letter, if it ever had an existence, is a false and forged document;*

that this testimony, and much more testimony necessary to establish the falsity of said evidence upon which said judgments were obtained, and the forgery of said pretended letter were unknown to the complainant *at the time of the trial*, and could not have been known to or anticipated by her, and have been discovered by her since the rendition of said judgments, and that there has been no laches on her part, etc. The relief asked was an injunction against the defendant, restraining him from executing the judgments, or any of them, and the prayer was that the judgments be annulled and avoided, as *obtained upon false testimony as to the existence of a document, etc.*, that the complainant have general and equitable relief.

A writ of injunction was issued, as prayed for. Defendant filed exceptions and plea of estoppel and *res adjudicata*. It was claimed by counsel for the complainant that the suit was an original suit, and as such was subject to removal. Mr. Justice HARLAN delivered the opinion of the court. He says: "According to the averments of "the original petition for injunction filed in the State "court—which averments must be taken to be true in "determining the removability of the suit—the judg- "ments in question would not have been rendered against "Mrs. Marshall but for the use in evidence of the letter "alleged to be forged. The case evidently intended to "be presented by the petition is one where, without "negligence, laches, or other fault upon the part of the "petitioner, Mayer has fraudulently obtained judgments "which he seeks against conscience to enforce by exe- "cution. While, as a general rule, a defense cannot be "set up in equity which has been fully and fairly *tried* "at law, and although in view of the large powers now

" exercised by courts of law over their judgments, a court " of the United States, sitting in equity, will not assume " to control such judgments for the purpose simply of " giving a new trial, it is the settled doctrine that 'any " fact which clearly proves it to be against conscience to " execute a judgment, and of which the injured party " could not have availed himself in a court of law, or of " which he might have availed himself at law, but was " prevented by fraud or accident, unmixed with any " fault or negligence in himself or his agents, will justify " an application to a court of chancery.'"

Marine Ins. Co. of Alexandria v. *Hodgson*, 11th U. S., 7 Cranch., 332, 336, (3: 362, 363.)

Hendrickson v. *Hinckley*, 58 U. S., 17th How., 443, 445, (15: 123, 124.)

Crim v. *Handley*, 94 U. S., 652, 653, (24: 216).

Metcalf v. *Williams*, 104 U. S., 93, 96, (26: 665, 666).

Embry v. *Palmer*, 107 U. S., 3, 11, (27: 346, 349).

Knox County v. *Harshman*, 133 U. S. 152, 154, (33: 586, 587).

2 Story Eq. Jur., Sections 887, 1,574.

Floyd v. *Jayne*, 6 Johns. Ch., 479, 482, 2 L. Ed., 190, 192.

U. S. v. *Throckmorton*, 98th U. S., 61, 65, (25: 93, 95),

" The rules laid down in *Barrow* v. *Hunton* were ap-
" plied in *Johnson* v. *Waters*, 11th U. S., 640, 667 (28:
" 547, 556), and *Arrowsmith* v. *Gleason*, 129 U. S.,
" 86, 101 (32: 630, 635). In *Johnson* v. *Waters*, this

" court upheld the jurisdiction of the Circuit court of the
" United States, by a decree in an original suit to de-
" prive parties of the benefit of certain fraudulent sales
" made under the orders of a Probate court of Louisiana,
" which court, by the law of that state, had exclusive
" jurisdiction of the subject-matter of the proceedings
" out of which the sales arose. After observing 'that the
" court of chancery is always open to hear complaints
" against fraud, whether committed *in pais*, or in or by
" means of judicial proceedings,' the court said: 'In
" such cases, the court does not act as a court of review,
" nor does it inquire into any irregularities or errors of
" proceeding in another court; but it will scrutinize the
" conduct of the parties, and, if it finds that they *have*
" *been guilty of fraud in obtaining a judgment or decree,*
" *it will deprive them of the benefit of it, and of any in-*
" *equitable advantage which they have derived under*
" *it.*' In *Arrowsmith* v. *Gleason*, the grounds of the
" jurisdiction of the Circuit court of the United States
" to entertain an original suit—the parties being citizens
" of different states—to set aside a sale of lands fraud-
" ulently made by the guardian of an infant, under
" authority derived from a Probate court, are thus
" stated: 'These principles control the present case,
" which, although involving rights arising under judicial
" proceedings in another jurisdiction, is an original, in-
" dependent suit for equitable relief between the parties;
" such relief being grounded upon a new state of facts,
" disclosing *not only imposition upon a court of justice*
" in procuring from it authority to sell an infant's lands
" when there was no necessity therefor, but actual fraud
" in the exercise, from time to time, of the authority so
" obtained. As the case is within the equity jurisdiction

" of the Circuit court, as defined by the constitution and " laws of the United States, that court may, by its de- " cree, lay hold of the parties and compel them to do " what according to the principles of equity they ought " to do, thereby securing and establishing the rights of " which the plaintiff is alleged to have been deprived by " fraud and collusion.'

" These authorities would seem to place beyond ques- " tion the jurisdiction of the Circuit court to take " cognizance of the present suit, which is none the less " an original, independent suit, because it relates to " judgments obtained in the court of another jurisdic- " tion. While it cannot require the State court itself to " set aside or vacate the judgments in question, it may, " as between the parties before it, if the facts justify such " relief, adjudge that Mayer shall not enjoy the inequit- " able advantage obtained by his judgments. A decree " to that effect would operate directly upon him, and " would not contravene that provision of the statute " prohibiting a court of the United States from granting " a writ of injunction to stay proceedings in a State " court. It would simply take from him the benefit of " judgments obtained by fraud."

What follows in the opinion of the court is important and interesting as showing that in all cases in the trial of a cause, where parties themselves have been guilty of fraud, and the other side was deceived thereby, the court will grant relief.

The case of *Marshall* v. *Holmes* closes by announcing this doctrine: " While the court upon final hearing " would not permit Mrs. Marshall, being a party to the " action at law, to plead ignorance of the evidence intro- " duced at the trial, it might be that relief could be

"granted by reason of the fact, distinctly alleged, that "*some of the necessary proof establishing the forgery of* "*the letter, was discovered after the judgments at law* "*were rendered* and after the legal delays within which "new trials could have been obtained, and could not have "been obtained by her sooner."

The doctrine of *Marshall* v. *Holmes*, is not a parvenu or exotic in equity law.

In the case of *Nelson* v. *First Nat. Bank*, (Nov. 13, 1895, 70 Fed. Rep., 526), it is decided that:

"A judgment which has been affirmed on appeal "* * * may be attacked by an original bill in equity, "and vacated and set aside on the ground that it was "obtained by fraud or *perjury*, or through accident or "mistake."

In *Jordan* v. *Volkening* (72 N. Y., 306), Judge RAPALLO says: "There can be no question that a judg- "ment or award obtained by false testimony fraudulently "given by the party benefited therein, is voidable."

Ins. Co. v. *Hodgson*, 7 Cranch, 332.
Young v. *Sigler*, 48 Fed., 182.
Easley v. *Kellum*, 14 Wall., 279.
Atkins v. *Dick*, 14 Pet., 114–20.
Davis v. *Tyleston*, 6 How., 114.
Humphrey v. *Leggette*, 9 How., 279.
Cage v. *Cassidy*, 23 Howe, 109.
Kibbee v. *Benson*, 17 Wall., 624.
Roller Mill Co. v. *Ore Co.*, 152 U. S., 596–615.
Carrington v. *Holabird*, 19 Conn., 84.
Waller v. *Graves*, 20 Conn., 305.
Talbott v. *Todd*, 5 Dana, 196.

Langford v. *Collier*, 1 A. K. M., 237.
Macfarlane v. *Clarke*, 9 Dana, 136.
Miller v. *Field*, 3 A. K. M., 109.
Southard v. *Russell*, 16 How., 547.
Foster v. *Wood*, 6 John. Ch., 89.
Stillwell v. *Carpenter*, 59 N. Y., 423.
Ross v. *Wood*, 70 N. Y., 10.
Bank v. *Stewart*, 114 U. S., 224–29–30.
City Bank v. *Skelton*, 2 Blatchford, 26.
Brown v. *County*, 95 U. S., 157.
Verplank v. *Van Buren*, 76 N. Y., 247, 248.
Heiser v. *Mayor, etc.*, 104 N. Y., 76.
Dexter v. *Arnold*, 5 Mason, 309.
Wood v. *Mann*, 2 Sumner, 324.
Ocean Ins. Co. v. *Field*, 2 Story, 59.

In the case of *Arrowsmith* v. *Gleason*, 129 U. S., 86–101, Gleason, the defendant, filed a bill in the state courts setting up certain facts as to the condition and value of real estate, and the necessity for selling the same, the estate being that of one for whom he was guardian. A decree was obtained upon such petition. Personal service was had upon the widow, and such a service upon the infant as required by statute. The cause was heard and the property ordered to be sold. Other lands were subsequently sold in like proceedings. These were all unnecessary sales, and it was alleged that they were fraudulently made to benefit Gleason. The court lays down this broad doctrine:

"If a case of fraud be established, equity will set aside "all transactions founded upon it, by whatever machin- "ery or contrivances they may have been effected,

" whether such machinery or contrivances consist of a " decree of equity and a purchase under it, or of a judg- " ment at law, or of other transactions between the ac- " tors in the fraud."

In this case the lying and perjury was done in the bill of complaint, and in the case of *Graver* v. *Faurot*,—the case at bar, the perjury and lying was done in the answer, so that it is a case in point that where the pleadings contain fraudulent representations upon which the court acts, and there is no evidence, *no trial*, no hearing, the court will not permit the party to enjoy the fruits of his iniquity.

The case of *Johnson* v. *Waters*, 111th U. S., 640, is a case where the court holds that the fact of being a party to a judgment or decree, does not estop a person from obtaining in a court of equity relief against fraud. The case was substantially like the one above quoted and holds the same doctrine.

There is an allegation in the bill that the case was never heard on its merits, and that there never has been a real contest in the trial or hearing of the case. Nor is the court invited again to go into the merits of an action already actually tried for the purpose of detecting fraud. The fraud alleged is found in the pleadings, and not in the evidence, and consists in the knowing and wilful falsehoods of the defendants about matters which they then held within their own knowledge and control, and about which the appellant had a right to know the truth.

The appellant was wholly without evidence, and therefore offered none, so that the newly discovered evidence, cannot be regarded as cumulative evidence, but newly discovered evidence, which had it been laid before the court, would have been

of such important, material and controlling character as to justify the court in which the decree was obtained in entering a bill to open the decree in the case.

Marshall v. *Holmes*, *supra*.

The newly discovered evidence clearly demonstrates that the appellee had by meditated and intentional contrivance, kept the complainant and the court in ignorance of material and controlling facts, as to misrepresentation of the facts whereby he has secured an unjust advantage and a decree adverse to the real merits of the controversy, and in such cases a court of equity will entertain a bill to impeach and annul such decree. While the bill shows the evidence is newly discovered, and the appellant had no means of obtaining it earlier, it also shows that the evidence discovered will demonstrate that the appellees conspired together to cheat and defraud the appellant out of his money and rights, and that they agreed between themselves to divide the spoils. This evidence is in writing, partly made by themselves and partly made by appellee, Faurot, in the books of the bank, entered by the book-keeper under his direction. It is impossible to believe that the agreement to buy the worthless stock, to unload it on Graver, and then, upon receipt of his money and notes, to divide it between the appellees, which division was then made, should have been unknown to the appellees at the time they filed their answers. They positively deny that any such agreement existed, or that any such agreement was made, or any such division was made. They must then at the time of filing the answer, by meditated and intentional contrivance, have kept Graver and the court in ignorance of these material and controlling facts, and by this means secured an unjust advantage and a decree adverse to the just merits of the controversy.

United States v. Throckmorton, 98 U. S., 66.

The appellees by demurring to the bill, admit all its material allegations, and set up as a bulwark against this alleged wrong that the frauds for which a bill in chancery will be sustained, to set aside a decree or a judgment between the same parties rendered by a court of competent jurisdiction, are frauds extrinsic, or collateral to the matter which might have been tried by the first court, and not a fraud which was in issue in that suit, *though it never was tried*, and for this purpose quote *U. S.* v. *Throckmorton*, 8th Otto, 61–71, L. C. P. Ed., B. 25, p. 93.

The case does not sustain the contention, for it was a case where the fraud was the issue, and *was very much tried.*

The defendants would have the boundary drawn between fraud and fairness, a thing the courts have always refused to do. They would have the court believe that only such frauds as have been scheduled and enumerated, would justify a court of equity in setting aside a decree, or arresting an execution.

Lord HARDWICKE says: "Fraud is infinite, and were "courts of equity to lay down rules how far they would "go and no further in extending relief against it, or to "define strictly the species or evidence of it, the juris-"diction would be cramped and perpetually eluded by "new schemes which the fertility of man's invention "would contrive." Parke Hist. Ch. P., 508; Story Eq. Jur., Sec. 186.

In the case of *Shedden* v. *Patrick*, 1 Macqueen, 535, it was charged, one side of a former litigation was possessed of facts which, if known to the other side, or to

the court, would have produced a different result, but which were fraudulently concealed. There the case was not dismissed on the objection of *res adjudicata*, and for the same reason the demurrer to Graver's bill here ought not to be sustained.

So in the case of *Kimberly* v. *Arms*, 40 Fed. Rep., 557, it is laid down as a general rule "that where a successful party has, by meditated and intentional contrivance kept the opposing side and the court in ignorance of material and controlling facts, whereby he has secured an unjust advantage, or a decree adverse to the real merits of the controversy, a court of equity will entertain a bill to impeach and annul such decree."

The court further says:

"In the well-considered case of *Patch* v. *Ward*, L. R., 3 Ch., 203, the court says that this case sustains this general rule above quoted. The court also says: 'But it is settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was *actually* "*presented* and *considered* in the judgment assailed.' *Vance* v. *Burbank*, 101 U. S., 519, and the case relied upon by the defendants of *U. S.* v. *Throckmorton*, 98 U. S., 66."

The court in *Kimberly* v. *Arms*, in criticising the latter case, says, "that the act of fraud relied on to support the bill is the false and fraudulent antedating of the grant so as to impose on the court the belief that it was made at a time when the party or official executing the same had power to make it, and the supporting of such simulated and false document by perjured witnesses. (Page 62.) The court further says about the

" *U. S.* v. *Throckmorton*, that there were other con-
" trolling facts and circumstances in that case, and the
" Supreme court affirmed the decree of the Circuit court
" sustaining the demurrer to the bill, and dismissing it
" upon its merits, thereby pointing out that the court did
" not decide the case on the question of a technicality,
" but dismissed the bill on other controlling facts and cir-
" cumstances, which facts and circumstances went to the
" merits of the case. What was said about the
" power of the court to set aside its decree on
" the ground of fraud extending to extrinsic or col-
" lateral matter, and not a fraud which was an issue in
" that court, may be regarded somewhat as *obiter dicta*,
" for the court, after making this statement, which if a
" bar, would have ended the discussion, took up the
" case and decided it upon its merits."

In the case of the *U. S.* v. *Throckmorton*, the court was of the opinion that the merits of the case were entirely with the defendant. The bill itself is harshly criticised as containing verbiage and repetitions, and of its suspicious silence as to anything tending to support the decree, and says there are important facts which cannot escape the attention of the coort. The court says the case was pending in litigation more than five years before the decree became final; that more than four years after the alleged fraudulent grant was filed in the case, and that the attention therefore of all the parties and of the court must have been drawn to a close scrutiny of any proceeding to supply an important document. There was also ample time to make all necessary inquiries and produce the necessary proof, if it existed, of the fraud. The bill was filed more than twenty years after the rendition of the decree, which it seeks to annul. During this

time Richardson, the claimant, and the man who is personally charged with the guilt of the fraud, has died; his heirs, who with himself were claimants in the suit, are not made parties, and the land has passed from his ownership to that of the present defendants by purchase and conveyance.

The court then goes on to say: "We have not recited "any of the foregoing matters found in the bill as suffi- "cient of itself to *prevent relief* in a case otherwise "properly cognizable in equity, but we think these are "good reasons why a bill which seeks under these cir- "cumstances to annul a decree *thus surrounded* by every "presumption which should give it support, *shall present* "*on its face a clear and unquestionable ground on which* "*the jurisdiction it invokes can rest.*"

The circumstances, the court tell us, were, first, an actual trial before the court upon pleadings and proofs which covered many years in taking the evidence; the direct question as to the genuineness and validity of a concession produced by the complainant, and was the single question pending before the court for a period of four years; that it was the thing, and the only thing, controverted and essential to a decree; the bill to impeach the decree was not filed till twenty years after the decree of the court, and upon a question, the very matter of which the court had tried for four years on the ground of fraud in a document, and upon which the decree was made; that the party who committed the fraud and sold the property to a *bona fide* purchaser, and who had remained in the possession of the property for twenty years after the decree had been made. The court held, that the complainant, from these surroundings and facts had "not presented on the face of his case a

" clear and unquestionable ground on which the jurisdic-
" tion rests." The court having stated these facts, addressed themselves to the law of the case, and with these facts before them started out to protect the *bona fide* purchaser, if it could be done without violating well settled principles of law. And so will this court in the case at bar, set out to right a great wrong, which is confessed by the demurrer, if it can be done within the rules and practice of equity as administered in this court. The case of *United States* v. *Throckmorton* is one of evidence produced in trial of a cause in which the evidence at the time of trial was challenged on the grounds of forgery—being a written instrument—and which, after the court hearing all the facts, and after the party had opportunity to show forgery, decided that it was a genuine instrument, and twenty years were allowed to run by before this evidence was attempted to be impeached on the ground of fraud. The court, therefore, say: " There is no ques-
" tion that fraud vitiates the most solemn contracts, doc-
" uments and even judgments. There is also no question
" that many rights originally founded in fraud become,
" by lapse of time—by the difficulty of proving the
" fraud, and by the protection which the law throws
" around rights once established by formal judicial pro-
" ceedings in tribunals established by law, according to
" the methods of the law—no longer open to inquiry in
" the usual and ordinary methods. Of this class are
" judgments and decrees of a court and subject to its
" jurisdiction, *in a trial which has presented the claims
" of the parties, and where they have received the con-
" sideration of the court.*" Now this is all *ad hoc*, and is cognate to the facts and circumstances which the court was then treating. In that case there had been a trial

which had presented the claims of the parties, and these claims had received "the consideration of the court for a "period of four years." It was a case then of this kind; that of lapse of time, twenty years, and the protection which the law throws around rights once established by judicial proceedings in case of a trial in which both parties had opportunity to try to expose the forgery or fraud in the evidence offered. The court go on to say: "In "a suit in chancery on proper showing, a rehearing is "granted. If new evidence is discovered after the de-"cree has become final, a bill of review on that ground "may be filed within the rules prescribed by law on that "subject." And these proceedings are all part of the same suit, and the rule framed for the repose of society is not violated. The court go on to give admitted exceptions to the general rule by way of enumeration of some cases in which relief may be granted, and close their remarks with saying: "These, and similar cases which "show that there has never been a *real* contest in the "trial or hearing of the case, are reasons for which a "new suit may be sustained to set aside and annul the "former judgment or decree, and open the case for a "new and fair hearing." Quoting authorities. In all these cases and many others which have been examined, the court says: "*Relief has been granted on the ground "that, by some fraud, practiced directly upon the party "seeking relief against the judgment or decree, that "party has been prevented from presenting all of his "case to the court.*"

On the other hand the court says by way of contrast, "the doctrine is equally well settled that the court will not "set aside a judgment because it is founded on a fraudulent "instrument or perjured evidence, or for *any matter which*

"*was actually presented and considered in the judgment* "*assailed.*" The clause, "fraudulent instrument or "perjured evidence," by relation means such as was "actually presented and considered." The court then quotes the case of *Tovey* v. *Young*, decided by the Lord Keeper in the High Court of Chancery in 1702, where the Lord Keeper said: "New matter may in some cases "be ground for relief (for a new trial at law), but it must "*not be what was tried before;* nor when it consists in "swearing only, will I ever grant a new trial, unless it appears by deed or *writing*, or that a witness on whose "testimony the verdict was given was convicted of per-"jury."

In the case at bar the bill shows that matter appears by writing, to wit: the contract between Faurot and Bailey to buy the worthless stock, and to unload it on Graver, and to divide the profits; and the bank book showing the receipts so divided. The case of *Smith* v. *Lowry*, is also quoted, where Chancellor Kent said, that the complainant must have known, or he was bound to know, that the price of salt at the place of delivery would be a matter of inquiry at the trial. The court then quote *Bateman* v. *Willoe*, where REDESDALE says: "I do not know "that equity ever does interfere to grant a trial of a mat-"ter which has already been *discussed* in a court of law, "a matter capable of being discussed there, and over "which the court of law had full jurisdiction." Mr. Justice MILLER then pointedly says: "The rule must "apply with equal force to a bill to set aside a decree in "equity after it has become final, where the object is to "*retry* a matter which was in issue in the first case, and "was matter of *actual* contest."

The court will perceive that the court had first stated

a case in *United States* v. *Throckmorton*, where matter had been tried for four years, and about which there was an actual contest, and in this view applies the language above quoted. The court, after quoting Mr. Justice Shaw's opinion in *Greene* v. *Greene*, to the same effect, says in conclusion: "The case before us comes within "this principle. The genuineness and validity of the "concession produced by the complainant was a *single* "*question* pending before the board of commissioners, "and the District court for four years. It was the thing "and the *only thing that was controverted*, and it was "essential to the decree. To overrule the demurrer to "this bill would be to *retry* twenty years after the decis- "ions of these tribunals, *the very matter which they* "*tried on the ground of fraud in the document on which* "*the decree was made.*"

An examination of *U. S.* v. *Throckmorton*, shows that the case was considered in several distinct aspects.

The court says:

(1.) "That the Circuit court had no jurisdiction to "interfere with or relieve against a survey, which, by the "allegation of the bill itself, *is pending* before the Dis- "trict court."

(2.) "There is another objection to the bill, which, "though not going to the merits, is, in our opinion, "*equally* fatal to it in its present shape."

"We are of opinion that, unless by virtue of an Act "of Congress, no one but the Attorney-General, or some "one authorized to use his name, can bring a suit to set "aside a patent issued by the United States, or a judg- "ment rendered in its courts on which such a patent is "founded. Then this is the case before us, and we see

" nothing in the bill to indicate to the court that it ever " received the sanction of the Attorney-General, or was " brought by him direct."

(3.) Mr. Justice Miller goes into an examination of the bill, which alleges that the grant upon which the judgment was obtained, was falsely and fraudulently antedated, and that to support this assimilated and false doctrine the parties procured and filed depositions of perjured witnesses. Thus it is seen that the *contestatio litis* was whether the grant was, or was not a forgery, and whether the evidence of the witnesses was, or was not perjury, and that the actual trial was had on this issue and decided against the complaining party, and the bill was filed by it to set aside the findings and retry this issue.

The judge further says, that " there is no allegation " that ever any of the attorneys, agents or other officers " of the Government, were false in their duty to it, or " that they asked or connived at the fraud unless a " single allegation on that subject, which shall be here- " after considered, sufficiently make such charge; for " the present it will be assumed that no such charge was " made."

The single allegation above referred to, is considered by Mr. Justice MILLER at page 69 of the report, and is to the effect that Howard, one of the defendants, that the law agent of the government had notice from the party of some other suit, of the fraudulent character of that grant, and that he neglected to inform the commissioners of the fact; and the Judge adds (69) " *if there* " *had been a further allegation*, that Howard was then " interested in the Richardson claim or that Richardson " had *bribed* him, or that, from any *corrupt motive*, he

" had betrayed the interests of the government, the *case* " would have come within the rule which authorizes " relief, but nothing of this kind is alleged."

Mr. Justice MILLER goes into an extended examination as cited by him, but it is a *noticeable fact* that he not only omits any reference to the doctrine, which in *Marshall* v. *Holmes*, Mr. Justice HARLAN says is the *settled doctrine*, namely, " that any fact which proves it to be " against conscience to execute a judgment, and of " which the injured party could not have availed himself " in a court of law, or of which he might have availed " himself at law, but was prevented by fraud or acci- " dent, unmixed with any fault or negligence in himself " or his agents, will justify an application to the court " of chancery." It is even more noticeable that he does not cite a single one of the cases which are cited by Mr. Justice HARLAN in support of that doctrine and which which were all reported prior to Mr. Justice MILLER'S opinion.

It is noticeable also that Mr. Justice MILLER sets forth in detail the " extraordinary " features of the bill before him, and *gives great weight to its peculiar facts*; for instance, at page 64 he speaks of the scrutiny which was necessarily given to the people during the trial, the necessity of it to support the claim, obvious to all persons interested (63), and the length of time which it was under consideration, *more than four years after the fraudulent grant* was filed (63), and that the bill was not filed " for " more than twenty years after the rendition of the de- " cree which it seeks to annul " (64). And he says (64): " But we think these are good reasons why a bill " which seeks, under these circumstances to annul a de- " cree thus surrounded by every presumption, should

"give its support, shall present on its face a clear and "unquestionable ground on which the jurisdiction it in-"vokes can rest."

At page 70 he says: "One great, if not *fatal*, de-"fect in the bill, is the absence of any declaration of the "means by which the fraud has been discovered *or can* "*be now established.*" No such criticism can be made of the bill in this case. (Rec., 12; Fol. 23, 24 and 25.)

It is difficult to say how many, or if all of these fatal defects were concurred in by the full bench. Any one of them might have been the one in which the court concurred.

The case of *Vance* v. *Burbank*, 101 U. S., 514, clearly shows what the court meant in the cases of *U. S.* v. *Throckmorton*, and *Marquez* v. *Frisby*, 101 U. S., 473, in speaking of a decree which cannot be disturbed in certain classes of fraud.

In this case Chief Justice WAITE delivered the opinion of the court. In discussing the question the court says:

"So far as this suit depends upon the original title of "Scott, it is clear, under the well settled rules of decis-"ion in this court, that there can be no recovery. The "question in dispute is one of fact; that is to say, "whether Scott, when he demanded his patent certificate "as against the other contesting claimants, had resided "on and cultivated the lands in dispute for four consecu-"tive years, and had otherwise conformed to the require-"ments of the Donation Act. This was to be deter-"mined by the Land Department, and *as there was a* "*contest*, the contending parties were called on in the "usual way to make their proofs. They appeared, and

" full opportunity was given Scott to be heard. *He pre-*
" *sented his evidence and was beaten*, after having taken
" the case through, by successive stages on appeal, to the
" Secretary of the Interior. This, *in the absence of*
" *fraud*, is conclusive on all questions of fact. We have
" many times so decided." Quoting the case of *U. S. v. Throckmorton.*

The court further says:

" It has also been settled that the fraud, in respect to
" which relief will be granted in this class of cases, must
" be such as has been practiced on the unsuccessful party
" and prevented him from exhibiting his case fully to the
" Department, *so that it may properly be said there has*
" *never been a decision in a real contest about the subject-*
" *matter of the inquiry.* False testimony or forged
" documents even are not enough, if the disputed matter
" has *actually* been presented to or considered by the ap-
" propriate tribunal.

" The operative allegations of this bill are of false
" testimony only. That testimony Scott had full oppor-
" tunity of meeting. Rehearings were granted him when
" the case seemed to require it, and he took all the ap-
" peals the law gave. The last decision was given by
" the highest department officer. If the evidence he
" presented to the Register and Receiver was not all
" considered on these appeals, it was clearly his own
" fault. It was more than six years from the time his
" first appeal was taken, before the final hearing was
" had. No fraud is charged on the Register and Re-
" ceiver, or on the heirs of Perkins, *in respect to the*
" *keeping back of the evidence.* If any was in fact not
" sent forward, and Scott did not discover the omission
" until one year from the time of the commencement of

" this suit, he must have been grossly neglectful of his " own interests. He does not state what the omitted " evidence was, or that it was anything more than cu- " mulative." Here the rule is sharply and clearly defined as to a class of cases, none of which does Graver's case fall within. There was no contest. Appellant did not present the evidence, and was beaten. Fraud is not absent but is present, and this fraud was practiced on the unsuccessful party and prevented him from exhibiting his case fully to the courts so that it might be properly said there never has been a real contest about the subject of inquiry.

Fraud is charged in respect to the keeping back of the evidence. All of this the court says will entitle the complainant to relief, but as to these matters in actual controversy, and of which evidence is submitted on either side, and where the other had an opportunity to answer and was not prevented by the fraudulent conduct of the successful party, in the suppression of evidence the court will not grant the relief.

The bill alleges, and the demurrer admits it, that the appellees obtained a dismissal of the appellant's bill without the appearance of the appellant or a trial, and as a consequence there was no contest, and that the defendant, without actual trial, and in the absence of the complainant obtained the decree upon these perjured answers. This amounts to a charge of fraud in the prevention of the complainant from presenting evidence " by " keeping back the evidence " and imposing on the court, so that this case falls within the rulings found in the opinion of Mr. Justice Waite, in the case above cited.

In *Webster* v. *Reed*, (11 How., 460), the court also says: " That where a judgment is brought collaterally before

" the court as evidence, it may be shown to be void upon " its face by want of notice to the person against whom " judgment was entered, *or for fraud.* This view would " support the case of *Stowell* v. *Eldred*, 26 Wis., 504." This case was an action on a judgment.

Defense that the judgment had been procured by the *perjured* evidence of the plaintiff. The judgment for $11,680.14 had been recovered by plaintiff against the defendants. COLE, J., (507):

" The answer demurred to alleges that said judgment " was fraudulently obtained as to $6,503.84, and de- " mands that for this amount the judgment should be " enjoined. It is not denied that the answer must have " the same effect given to it as a bill in equity under the " old practice, to relieve against a judgment at law. If, " therefore, the matters stated in the answer would con- " stitute good grounds for an injunction in a bill of equity, " they must be sustained as a defense here.

" It is claimed by the defendant that the matters stated " in the answer show that the judgment is unjust; that it " was *procured by perjured testimony given by one of the* " *plaintiffs*, and that it would be unconscionable to al- " low it to be enforced for the full amount. * * * " To our minds, the answer not only shows, with suffi- " cient particularity, that *a high crime was committed* " on the trial by one of the plaintiffs *swearing falsely* " upon a most material fact in the original suit, but it " also shows that the defendant has not by his *laches* " forfeited his right to claim the interposition of a court " of equity to enjoin the judgment. *Of course, the alle-* " *gations of the answer must be assumed to be true on* " *the demurrer.* And this being so, we are certainly " warranted in saying that the plaintiff, Samuel R. Haven,

"who was the only one of the plaintiffs present at the "trial, and who was called as a witness by the defendant "to prove the agency of Scofield in accepting the sur- "render of the demised premises, *was guilty of perjury.* "* * * (509). The answer further shows that the "agent, Scofield, had removed from and left the city of "Chicago, and that his place of residence was unknown "to the defendant, who, upon diligent inquiry, was un- "able to find or procure such agent as a witness on the "trial. *And the question now is: Was the defendant "guilty of laches in going to trial under the "circumstances without asking for a continuance "of the cause to enable him to procure the attendance of "Scofield, and relying upon the plaintiff, Haven, tell- "ing the truth under oath?* It seems to us not. If a "party goes to trial relying upon the opposite party to "prove his case when called as his witness, he may have "no equitable ground for relief upon failing to prove "what he expected to, so long as such opposite party "testifies truly to matters within his knowledge. *But "he has a right to act upon the presumption that the "opposite party, when sworn, will not commit perjury.* "We, therefore, do not think that it was negligence for "the defendant to go to trial relying upon the plaintiff, "Haven, testifying truly in regard to the agency of Sco- "field."

The order sustaining the demurrer was reversed.

Stowell v. *Eldred*, 39 Wis., 614 (187[illegible] case on an appeal from the judgment, af[illegible] merits, in which the former decision wa[illegible] the plaintiff having established the *perju*[illegible] to the former suit by which the judgmer[illegible] covered, obtained the relief he asked fo[illegible]

See also Bulkley vs. Wilford 2 Cl. & F.

" the court as evidence, it may be shown to be void upon " its face by want of notice to the person against whom " judgment was entered, *or for fraud.* This view would " support the case of *Stowell* v. *Eldred*, 26 Wis., 504." This case was an action on a judgment.

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The order sustaining the demurrer was reversed.

Stowell v. *Eldred*, 39 Wis., 614 (1876), is the same case on an appeal from the judgment, after a trial on the merits, in which the former decision was followed, and the plaintiff having established the *perjury* of the party to the former suit by which the judgment had been re- covered, obtained the relief he asked for. A curious at-

Easley vs. Kellom 14 Wall., 279

tempt was made to avoid the contention that Haven's evidence was perjured, which was disposed of by the court as follows, page 633:

" It is claimed, however, that the case is not within " that rule, for the alleged reason that Dr. Haven did " not commit *perjury* in his testimony on the trial of the " Illinois suit, but that he had forgotten the facts and " testified honestly, though inaccurately. The answer " to this position is that Dr. Haven, knowing all the " facts essential to Eldred's defense in that suit, *ought* " *not to have forgotten them when a little honest effort* " *in that direction would have brought them within his* " *recollection.*

" He and his co-plaintiffs cannot be heard in a court " of equity to assert such forgetfulness, and thereby com- " pel Anson Eldred to pay them many thousand dollars " more than in equity and justice he owes them."

In the case of *Steele* v. *The St. Louis Smelting, etc., Co.*, 106 U. S., 447, the court says: " The validity of " a patent of the government can not be assailed collat- " erally, because false and perjured testimony may have " been used to secure it, any more than a judgment of a " court of justice can be *collaterally* on like ground. If " a judgment has been obtained by such means, the " remedy of the aggrieved party is to apply for a new " trial, or take an appeal to a higher court; *and if the* " *testimony was accompanied* with acts *which prevented* " him from presenting to the court *the merits* of his " case, or by which the jurisdiction of the court was im- " posed upon, he may also institute some *direct* proceed- " ing to reach the judgment." This bill is such a direct proceeding.

In the case of the *Pacific R. R. Co.* v. *The Mo. Pacific*

See Also Bulkley vs. Wilford 2 Cl. & Finn - 127

R. R., 111 U. S., 505, a bill was filed for the purpose of setting aside a decree or foreclosure of a mortgage in a suit brought in a circuit court of the United States, in Missouri, alleging fraud *in fact* in the foreclosure suit and conduct of solicitor and officers of the corporation, defendant in that suit, and praying that the decree in the foreclosure suit be set aside. On demurrer the bill was held good. The fraud was all extrinsic to the entering of the decree, but was conducive to the entering of the fraudulent decree. The court says: "As to the mat-
" ters alleged, which are extrinsic, or collateral, to the
" issues in the foreclosure suit, to what extent, greater or
" less, there is no jurisdiction to examine them under
" this bill, is a question not to be decided on these de-
" murrers to the whole bill. The bill is sufficient in re-
" gard to the other frauds alleged. But, in regard to
" one of those extrinsic matters, the bill states that
" specified property not covered by the mortgage was put
" into the decree without the knowledge of this plaintiff."

"Upon the question of jurisdiction there can be no
" doubt that the Circuit court, as the court which made
" the Ketchum decree, and had jurisdiction of the
" Ketchum suit, as this court in *Railroad Company* v.
" *Ketchum*, 101 U. S., 289 (XXV, 932), held it had,
" has jurisdiction to entertain the present suit to set aside
" that decree on the grounds alleged in the bill, if they
" shall be established as facts, and if there shall be no
" valid defense to the suit, although the plaintiff and
" some of the defendants are citizens of Missouri. The
" bill falls within recognized cases which have been ad-
" judged by this court, and have been recently reviewed
" and reaffirmed in *Krippendorf* v. *Hyde* (*ante*, 145.)"

The Decree in this Case.

The learned chancellor in the court below was unable to distinguish the case of *Marshall* v. *Holmes* (140 U. S., 598) from the case of the *U. S.* v. *Throckmorton* (98 U. S., 61 and 65), he says: "The fraud set up in the "former case was of the same character in both "cases. Hence the court can see no distinction be- "tween them, and as the case of *Marshall* v. *Holmes* "is the last expression of the Supreme court on this sub- "ject, and the result is diametrically opposed to the re- "sult arrived at in the case of the *U. S.* v. *Throckmor- "ton*, the former case should, being later in date, be re- "garded as overruling the former decision." The learned chancellor, however, hesitates to apply this rule because the Supreme court, in deciding the case of *Marshall* v. *Holmes*, refers with approbation to the case of the *U. S.* v. *Throckmorton*. The learned chancellor omits to observe that while the fraud set up in both cases is the same, the proceedings before the court were not the same. In one the merits and issues were actually litigated, and the court pronounced judgment on them, in the other the facts were not litigated and the court did not actually and in fact pass upon them. The paragraph in which this case is cited with approval in the case of *Marshall* v. *Holmes*, contains a series of propositions of law. The (1) is that where one without negligence, laches or other fault, has suffered by a judgment fraudulently obtained against him, and which the judgment creditor seeks against conscience to enforce by execution, he may have relief.

Metcalf v. *Williams*, 104 U. S., 93.

2. While as a general rule a defense cannot be set up in equity, which has been *fully* and fairly tried at law, a court of equity will not assume to control such judgment for the purpose of simply giving a new trial.

Marine Ins. Co. of Alexander v. *Hodgson*, 7 Cranch, 332.

Emberry v. *Stanton and Palmer*, 107 U. S., 3.

Hendrickson v. *Hinkley*, 17 Howard, 443.

U. S. v. *Throckmorton*, 98 U. S., 61.

3. It is the settled doctrine that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not avail himself in a court of law, or which he might have availed himself of at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery. (*Metcalf* v. *Williams*, *supra*.)

The cases of the *U. S.* v. *Throckmorton*, *Emberry* v. *Palmer*, *Hendrickson* v. *Hinkley*, and the *Marine Ins. Co. of Alexandria* v. *Hodgson*, are referred to and quoted to sustain the second series, not to sustain several of the other series. Other authorities are quoted for this purpose. The court did not suppose that the case of the *U. S.* v. *Throckmorton* went further than to decide the case before it, a case which had been fully and fairly tried, covering a period of many years, and as to those cases which had not been fully and fairly tried, without fault or negligence of the party adversely affected by it, the court held were not within the ruling of this case, and to this effect the case of *Metcalf* v. *Williams*, (104 U. S., 93) is quoted. Cases that had been fully and fairly

tried, and judgments rendered thereon, like the case of *Emberry* v. *Palmer*, *Hendrickson* v. *Hinkley*, and *U. S.* v. *Throckmorton*, (*supra*,) were cases referred to only as cases where the courts of equity would not retry the cause. It is against a retrial of a cause which has actually been tried, that is, litigated, that the *U. S.* v. *Throckmorton*, is aimed, and referred to as such, and not to cases where the facts have not been tried, which is the subject of the complaint of fraud, and which fact, when against conscience to execute a judgment, or which he was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, the court on the other hand decides would justify an application in a court of chancery. In other words, a sharp and clean distinction is here made between cases which had never been tried and, without fault of the complainant, a decree is rendered against him, and cases in which the merits were fully tried and litigated, and the bill seeks a mere retrial of these issues, and the authorities to sustain these are massed together at the foot of the paragraph in the opinion.

A brief review of the case will demonstrate this.

The case of the *Marine Ins. Co. of Alexandria* v. *Hodgson* (7 Cranch, 332), is a case of an appeal from the decree of the Circuit court of the District of Columbia, sitting at Alexandria in a suit in equity, brought by the Marine Insurance Company, of Alexandria, against one Hodgson to enjoin so much of a judgment at law, obtained by the latter against the former, as exceeding the value of the brig "Hope," as found by the jury in a special verdict upon a valued policy. The bill alleged as ground of relief the refusal of the court below to receive two pleas offered by the complainants on the trial at law,

that the rejection of pleas is of itself a ground for a court of equity to relieve, where complainants have no opportunity to show fraud. The rejection of those pleas had been assigned for error in the court when the cause was formerly before the Supreme court. The rejection was sustained. But the court say: "In the case under consideration, the plaintiffs asked the aid of a court to relieve them from a judgment, on account of a defense which, if good anywhere, was good at law, and which they were not prevented by the act of defendants, or any pure and unmixed accident, from making at law. It will not be said that a court of chancery cannot interpose in any such case. * * * There may be cases in which its relief ought to be extended to a person who might have defended, but has omitted to defend himself at law." The court then discussed the case on its merits and find no fraud proved, and for this reason dismissed the bill.

In the case of *Hendrickson* v. *Hinckley* (17 Howard, 443), suit was brought by the plaintiff against the defendant on the law side of the court on notes made by the defendant. The defendant pleaded fraud *in pays* and for want of consideration. The suit was tried and resulted in a judgment against the defendant. The bill was filed in this case setting up these facts, and that Campbell, one of the defendants, had at the time of trial a large set-off against the notes which were in judgment, which they omitted to set up in that suit by the advice of counsel; that the plaintiff was a non-resident, and as relief, that said judgment be enjoined and said set-off allowed against it on the ground of surprise, fraud, etc.

Mr. Justice Curtis delivered the opinion of the court, and after setting forth the doctrine that a court of equity

would give relief against a judgment at law, where he had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or agents, the court says that "the "application of this rule to the case stated in the bill "leaves the complainants no equity whatever."

The court, in criticising the defense, say that "the "fraud was pleaded in the action at law, and the jury "found against the defendants. Moreover, upwards of "six years elapsed after the alleged fraud occurred and "before the suit was brought, and there is no pretense "that the parties were ignorant of the alleged fraud dur-"ing any considerable part of this period of time, nor did "they offer to rescind the contract, nor did they at any "time either return or offer to return the property "sold."

The court after reciting the doctrine laid down in the case of the *Marine Ins. Co.* v. *Hodgson* (*supra*), and stating the facts, say in reference to the case: "Taken "as a whole, it must be admitted that the pleadings "fully and fairly presented every matter at issue between "the parties. Both parties appeared on a subsequent "day, and they went to trial, the records showing that "the verdict was against the appellant. * * *

"Enough appears in this case to show that evidence "was introduced in support of all the issues presented by "the pleadings, and that the error, if any, must have "been committed by the jury. * * * It must be "assumed that all the evidence offered by the defendant "was admitted, and the record does not show that any "evidence offered by the plaintiff was admitted, to which "the defendants objected. Viewed in the light of these "suggestions, it is clear that the record furnishes no

" ground whatever to suppose that the defendant did not " enjoy every right which belongs to a litigant party, " without diminution or restriction."

In the case of *Metcalf* v. *Williams*, 104 U. S., 93, a judgment was rendered without a trial and through the mistake of the defendant's counsel. A motion was made in the trial court to set it aside, which was denied. The bill thereupon was filed in equity to set aside the judgment upon the grounds that the judgment was a surprise upon the complainant, and a mistake, and the court inquired into the merits of the case and found that the complainant had a good defense to the action at law, and through an excusable mistake and surprise, this defense was not set up, and there was no hearing at the trial upon the merits. In this case the defendant in the bill in equity was guiltless of any fraud.

The bill was sustained.

In the case of *Emberry* v. *Stanton & Palmer*, 107 U. S., 3, the appellant filed his bill in equity for relief against a judgment at law. An answer was filed, and at the time of the trial the complainant's counsel did not appear. Judgment was had against Stanton & Palmer. The court say: first, that there was no fraud, and, secondly, that in the suit brought it was contested at every point. The parties were adversaries. Again the court say: " This " is not all." The question in contention was left to the jury upon evidence submitted. It was one of the points at issue, and was so regarded by both parties. After the verdict a motion was made for a new trial on the ground of after discovered testimony, but the motion did not disclose what that evidence was, nor was any affidavit filed. Of course the motion was overruled. The court claims that the parties were guilty of laches. The court closed by

saying: "It is to be remembered that there is nothing "unconscionable or oppressive in the judgment itself "which is the subject of the present complaint."

THE CIVIL LAW.

Under the civil law, which is the foundation of chancery and equity jurisprudence and whose fountains feed the noble stream of this both in England and in this country, one of the well known grounds for avoiding any judgment obtained by fraud, was that of perjured evidence, because it deceives and misleads the court.

THE CIVIL CODE. Lib. VII. Titulus LVIII.

Si ex falsis instrumentis VEL TESTIMONIIS judicatum sit.

I. Impp. Severus et Antoninus A. A. Bassianum.

Si tabulas testamenti, quas secutus proconsul vir clarissimus sententiam dixit, falsas dicere vis; praebebit notionem suam, non obstante prae-scriptione rei judicatae quia nondum de falso quaesitum est.

II. Imp. Alexander A. Optato.

Et qui non provocaverunt, si instrumentis falsis se victos esse probare possunt; cum de crimine docuerint ex integro de causa audiuntur.

Proposit 16 Calend octobris Juliano 11 et Crispino Coss.

III. Idem A. Clement.

Falsam quidem testationem, qua diversa pars in judicio adversus te usa est (ut proponis) solito more arguere non prohiberis.

Sed causa judicati in irritum non devocatur, nisi probare poteris eum, qui judicaverat secutum ejus instrumentum fidem, quod falsum esse constiterit adversus te pronunciasse.

Proposit 7 calend septembris.

IV. Imp. Gordianus A. Herennio.

Judicati executio solet suspendi et soluti dari repetitio, si falsis instrumentis circumventam esse religionem judicantis (crimine postea falsi illato) manifestis probationibus fuerit ostensum.

Propos 5 *id.* septemb.

Corpus Juris Civilis, Tom II., p. 446.

Geo. Aug. Spargenberg.

Gottingae.

Corpus Juris Civilis, Tom II., p. 348.

Donysii Gothfredi.

Antverpiae, MDCCXXVI.

Les Douze Livres du Code de l'empereur Justinien, traduit en Français par P. A. Tissot, Metz., 1807 (Vol. 12, p. 127.)

Code, Livre VII., Titre LVIII.

De ce qui a été jugé d'après de fausses pièces et de faux témoignages.

1. *Les empereurs Sèvère et Antonin à Bassianus:*

Si vous voulez arguer de faux un testament d'après lequel le noble pro-consul a prononcé une sentence, il entendra vos réclamations, nonobstant la chose jugée, parce que la question de faux n'a pas été décidée.

2. L'empereur Alexandre à Optatus:

Ceux mêmes qui n'ont pas appelé de la sentence rendue

contre eux sur de fausses pièces, doivent être extendus s'ils peuvent prouver le faux, parce qu'ici, s'agissant d'un crime, la cause doit être recommencée en entier.

Fait le 16 des. cal. d'Oct., sous le second cons. de Julien et le premier de Crispinus.

3. Le même empereur à Clément;

Vous n'êtes point empêché d'arguer de faux la pièce dont votre adversaire, d'après ce que vous observez, a usé contre vous en justice. Mais la chose jugée ne sera révoquée qu'en tant que vous pourrez prouver que le juge a basé la sentence qu'il a prononcée contre vous sur la pièce que vous prétendez être fausse.

Fait le 7 des calends de Septembre.

4. L'empereur Gordien à Herennius:

On suspend ordinairement l'exécution de la chose jugée, et l'on donne la répétition de ce qui aurait déjà pu être jugé, lorsqu'il est prouvé par la suite et par les preuves évidentes, que la religion du jugé a été trompée par de fausses pièces.

Fait le 5 des ides de Septembre.

Book 7, Title 58 :

If judgment has been obtained by false documents or testimony.

I. The emperors Severus and Antonius to Bassianus :

If you wish to show that the pages of the will, relying upon which the illustrious proconsul has given judgment, are forgeries, he will make his own investigation, the objection of a former decision not standing in the way, *because there has not yet been an inquiry about the forgery.*

II. The emperor Alexander to Optatus:

And those who have not appealed, if they can show that they were defeated by false evidence, because a crime is involved, can have the cause heard entirely anew.

III. Same to Clement.

You will not, indeed, be prevented by the common usage from showing (as you propose) that the testimony which the opposite party used against you in court is perjured.

But a decision is not declared a nullity unless you can show that he who had decided to pronounce judgment against you relied upon the faith of that evidence which has been proved to have been perjured.

IV. The emperor Gordianus to Herennius:

The execution of a judgment is usually stayed, and a recovery of the amount paid granted, the allegation of perjury having been advanced, if it has been shown by clear proofs that the conscience of the court has been imposed upon by the perjured evidence.

See Also
Mocheldey's Roman Law
P 190. Note 6.

The Law of England.

Patch v. *Ward*, Law Rep., 3d Ch. App., is referred to in *Kimberly* v. *Arms*, 40 Fed. Rep., 557, as being a well-considered case on the question as to what fraud will be sufficient to set aside a decree. Lord CAIRNS, in delivering the opinion of the court in *Patch* v. *Ward*, says: "Now, it is necessary to bear in mind what is meant, and "what must be meant by fraud, when it is said that you "may impeach a 'decree signed and enrolled on the "ground of fraud.' The principle on which a decree "may be thus impeached is expressed in the case which "is generally referred to on this subject, the Duchess of "Kingston's case, where the judges, being consulted by "the House of Lords, replied to one of the questions, "'fraud is an extrinsic collateral act, which vitiates the "most solemn proceedings of courts of justice.' Lord "COKE says 'it avoids all judicial acts, ecclesiastical "or temporal.' The fraud there spoken of must clearly, as it seems to me, be actual fraud, such that "there is on the part of the person chargeable with it the "*malus animus*, the *mala mens* putting itself in motion "and acting in order to take an undue advantage of some "other person for the purpose of actually and knowingly "defrauding him. And that that is so, is, I think, "further illustrated by looking at the form of decree "which this court is in the habit of making when a bill "to impeach, on the ground of fraud, a decree signed "and enrolled, is successful. In *Carew* v. *Johnston*, "Lord REDESDALE made a declaration in these words: "'Declare that the several decrees and proceedings in "the said cause instituted by the said late defendant, "John Pine, deceased, against the said Thomas Pyke,

" deceased, and others, appear to have been erroneous " and unjust, and to have been fraudulently obtained, " and had by the said John Pine and by the defendant, " Johnson (who was the assignee of the said John Pine " of the benefit of such suit and the person really in- " terested therein), by taking advantage of the real im- " becility of mind of the said Thomas Pyke and the em- " barrassed state of his affairs in Ireland, and the negli- " gence and misconduct of those who, by reason of the " incapacity of the said Thomas Pyke, took upon them " the care and custody of his person and fortune, and " treated him as a person of unsound mind, and incap- " able of managing his affairs, without obtaining any " authority to do so by suing out any commission either " in England or Ireland in the nature of a writ to en- " quire of the idiocy or lunacy of the said Thomas " Pyke.' I apprehend the fraud, therefore, must be a " fraud which you can explain and define upon the face " of a decree, and that mere irregularity, or the insist- " ing upon rights which, upon a due investigation of " those rights, might be found to be overstated or over- " estimated, is not the kind of fraud which will authorize " the court to set aside a solemn decision which has as- " sumed the form of a decree signed and enrolled."

The fraud complained of in this case was that one Vulliamy made an affidavit, and that the making of the affidavit by him instead of by Ward, a party to the suit, was resorted to *in order that the truth might not appear to the court.* The court finds if this was the purpose and the *facts sworn to were false*, that the relief would be granted, but the court was of the opinion that " Ward " might fairly entertain the opinion that the view upon " which he acted was the right and true view in point of

" law, and if he so acted the court would not go so far " as saying that he was influenced by any fraud, im- " proper motive or design."

The court, however, compelled the party to pay the costs on account of the doubt which had arisen from his conduct, and which unexplained required an investigation. This case is quoted eight or nine times in Daniels' Ch. Pleading and Practice with approval, and as tending to show that if a party to the suit procures another or himself to make an affidavit for the purpose of concealing the true state of facts from the court, thereby gaining an advantage, if it is in a decree, an original bill will lie to set it aside. *Patch* v. *Ward*, has been followed in *Verplanck* v. *VanBuren*, 76 N. Y., 247, 258, and in a long list of American cases.

In *Abouloff* v. *Oppenheimer*, L. R., 10 Q. B. D., 301; *Vidula* v. *Lowes*, L. R., 25 Q. B. D., 210; the English Court of Appeals distinguishes between *errors* of the court and the deception of the parties, and while it is permitted to show that the court was misled, it was not permitted to show that it had been mistaken.

Applying these principles to the case at bar, can it make any difference that the party himself made a sworn answer which is but an affidavit, *in order that the truth might not appear to the court* in a case where the bill alleges that the affidavit or answer was in all its material allegations feloniously false and perjury, or made a similar affidavit to the bill?

The bill requiring the defendants to answer under oath in the bill was, as we have seen, in the nature of a bill of discovery, and the defendants answered falsely and suppressed the evidence, and it was at that time not in the

power of the appellant to obtain the evidence elsewhere or by other means, and it was by the fraud of the appellee, unmixed with negligence or fraud on the part of the appellant. The answers are required to be under oath, and therefore the defendants cannot complain if the complainant relied on the matter in them. The matters responsive to the allegations in the bill are solemn assertions and representations made to the court and to the appellant, and he will not be blamed, in the absence of the ability to obtain evidence showing their falsity, for having relied on them. *Pence et al.* v. *Langden*, 99 U. S., 578. *Tollman* v. *Smith et al.*, (43 Ill. App., 502), even goes farther than is here contended. It is not like the case of allegations in a count of a declaration or a plea, which, in case of being untrue, cannot be adduced as evidence of fraud or in justification of reliance upon either through the neglect of any defending against it.

In all the cases quoted by the appellant in this brief, the court is careful to lay down the doctrine, that no decree or judgment is binding upon him, and that he may ask the aid of a court to set it aside on the grounds that he was prevented from defending the case upon its merits, by the fraud of the opposite party, unmingled with neglect or fraud on his part, and that in a case where the matter has not been actually tried or litigated, the courts may inquire into the truth of the matter, and in such case, if it is found that the merits are with the party complaining, and, that the successful party has been guilty of fraud, the court will not allow such a party to enjoy the fruits of his fraud. The court must remember it is but a recent date since the parties to the suit, or the parties having an interest therein, were qualified as witnesses, so that the earlier cases were not generally applied to parties to the suit, but to witnesses suborned by them.

In the case at bar there is confessedly an admission that a motion was made to dismiss the injunction granted, before Judge Shepherd on bill and answer only, and that the injunction was dissolved. Being simply an injunction bill, in the ordinary course of practice, the bill should have been dismissed without prejudice. It was allowed to stand, however, and at a subsequent term, as confessed by the demurrer, the defendant had the bill set down and heard on answers only, and dismissed for want of equity, and then uses this as *res adjudicata* in answer to a plea setting up the fraud in an action by the appellee Faurot on the promissory notes, yet unpaid, obtained from the appellant by this cruel and unmitigated fraud.

If appellee could go on and consummate this fraud by collecting the balance of the notes which were procured nnder it, and a court of equity could not interfere because of the technical objection, that in a case which had never been tried, and in which he had obtained an advantage by adding to the fraud and roguery the crime of perjury, the court would be lending a shield to assist the wrongdoer, and not to protect the innocent. The same iniquity that cheated the appellant out of his notes and money is a running account of fraud, by which the appellee comes into court and, by falsely swearing to an answer, deprives the appellant of in any way defending himself against the consequences of the deceit.

The bill alleges that the decree of dismissal was obtained without the knowledge and without notice to the appellant. We do not press this however, because if the appellant had been personally present at the time, and by reason of the fraud of the defendants, was without evidence to contradict these answers, the result must have been the same, and the bill would have been dismissed; but like the case of *Marshall* v. *Holmes*, and other cases

quoted in this brief, such a decree will be subject to be set aside, because appellant was compelled to solely rely on these false answers, and had no means whatever within his knowledge or reach to disprove them on a trial, if a trial had taken place. This was caused solely by the suppression and false swearing of the defendant. All the evidence lay exclusively suppressed within their bosoms and bank-box, and consequently by this dishonest conduct the defendants gained an unholy advantage in obtaining the decree. Hence, it makes no difference whether the bill was dismissed without the knowledge, or without notice to the appellant; notice could not avail him, the defendants had put *that* beyond his reach and power.

This proceeding on the part of the appellee is all part and parcel of the same fraud. The false representations whereby he obtained the notes and money, and the perjury in his answer to the bill that sought to bring him to account for his iniquity, and the attempt to use the decree thus obtained as *res adjudicata* in a present litigation, are a unit, and "the rule framed for the repose of "society is not violated by allowing a bill to be filed" for the purposes of establishing perjury in the answer, and setting aside the original decree in a case where there has been actually *no trial*, no evidence offered, and where the court has given the case absolutely no consideration, and where the rights of no third parties are affected; to *arrest* defeat litigation *pending* in which the wrong-doer seeks to use the fruits of his perjury to still further consummate the original fraud.

We therefore respectfully ask the court to answer the certified question proposed by the Court of Appeals in the affirmative.

ROBERT RAE,
Solicitor for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1895.

No. 779.

On a Certificate from the United States Court of Appeals for the Seventh Circuit.

WILLIAM GRAVER, APPELLANT,

vs.

BENJAMIN C. FAUROT.

BRIEF AND ARGUMENT FOR APPELLEE.

FRANK L. WEAN,
FRANK O. LOWDEN,
For Appellee.

THE GUNTHORP-WARREN PRINTING COMPANY, 66 MADISON ST., CHICAGO.

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WILLIAM GRAVER, APPELLANT,

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BENJAMIN C. FAUROT.

BRIEF AND ARGUMENT FOR APPELLEE.

The bill in this case was originally filed in the Superior Court of Cook County, January 11, 1894, and afterwards removed to the United States Circuit Court for the Northern district of Illinois.

This bill, as amended, alleges the filing of a former bill by the present complainant, in the Superior Court of Cook County, against the same parties defendant, and purports to set out such bill, the answers of the defendants thereto, and the final decree of the court thereupon, *in haec verba.*

The former bill was filed on September 18, 1888, and charged the defendants, Faurot and Bailey, with combin-

ing and confederating together for the purpose of defrauding the complainant in the matter of selling to him certain corporation stock, and also charged that certain notes were obtained from the complainant by the defendants through misrepresentation and fraud. The bill prayed for an injunction against the defendant Faurot, enjoining him from disposing of the notes; it was also prayed that the notes be surrendered up and canceled, and general relief was asked for. The bill contained no prayer for discovery and no interrogatories were propounded to the defendants; they were not called upon by the bill to make any disclosures for the information of the complainant; but, on the other hand, the matters of fraud were charged in the bill as facts, at the time known to the complainant, alleged and charged upon his solemn oath. (Pr. Rec., 2–4.)

To this bill the defendants filed their respective answers under oath, in which answers they denied all the allegations of fraud and the material allegations of the bill. (Pr. Rec., 5–9.)

The defendants afterwards moved for a dissolution of the injunction, which motion was heard upon the bill and answers, and on the 17th day of December, 1888, the injunction was dissolved. (Pr. Rec., 9.)

On July 18, 1889, nearly ten months after the filing of the bill, and more than six months after the dissolution of the injunction, a decree was entered in the cause by the Superior Court of Cook County, which decree shows on its face that the case was disposed of by the court in the regular and orderly manner, and that the court was "fully advised in the premises."

This decree, as set out in the present bill, is as follows:

"July 8, 1889. This case coming on to be heard, came the parties hereto by their solicitors respectively, and the court having heard the evidence, arguments of counsel, and being fully advised in the premises, finds the equities of this case to be with the defendants. Therefore it is ordered that this case be, and the same is hereby dismissed at the complainant's costs, for want of equity, and that the defendants have of the said plaintiff their costs in the premises." (Pr. Rec., 10.)

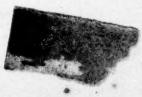
It appears from the bill that this decree stood unchallenged by the complainant (appellant here) from the date of its entry, July 8, 1889, to January 11, 1894, a period of nearly five years, and yet the complainant alleges in the present bill that at the time of filing the former bill he was absolutely certain that the matters and things therein stated were true. (Pr. Rec., 9.)

This complainant now charges, after nearly five years' acquiescence in the decree referred to, that such decree was obtained by fraud, the principal allegations for this purpose being as follows:

"Your orator charges that the said decree was obtained by false swearing and perjury of said Faurot and Bailey, and that this court was deceived and imposed upon thereby, and that said decree was obtained by fraud." (Pr. Rec., 18.) And also:

"Your orator would further show that it was by reason of the suppression of testimony on the part of the said respondents, and by absolute fraud and perjury on their part in the allegations contained in their respective answers that said bill was dismissed for want of equity, and that complainant was not able to obtain evidence to establish the allegations of his said bill." (Pr. Rec., 10.)

The bill also goes on to re-allege with a little more elaboration, the same subject-matter as that contained in the



former bill, and a decree in favor of the complainant is prayed for upon such subject-matter. (Pr. Rec., 13–17.)

The bill as amended also prays:

"That the said decree of your Honor dismissing the bill originally filed in this case, dismissing the said bill for want of equity may be reversed and no further proceedings taken thereon, and the said decree dismissing the bill originally filed in this case, dismissing said bill for want of equity, may by reason of the false swearing and perjury of the defendants, in their respective answers to said bill, be declared null and void and of no effect, and that the said defendants, or either of them, may not be permitted to plead the same in any court of competent jurisdiction, or otherwise use the said decree to the prejudice of your orator." (Pr. Rec., 20.)

A perusal of the whole bill shows that its object and purpose are not simply to set aside and annul the former decree, but to re-try the former suit upon alleged new proofs. It will thus be seen that the complainant has united in one bill different and distinct grounds of review, which invoke different relief under each branch, and separate defenses to the different parts of the bill. The object and effect of that branch of the bill resting on fraud is to vacate the decree *in toto*, not to re-try the case; while the purpose and effect of a bill of review based upon newly discovered evidence is to suspend the decree and re-try the case upon the original and new proofs.

A demurrer, filed by the defendant Faurot, was sustained, and the bill dismissed by the Circuit Court, from which decree of dismissal the complainant appealed to the United States Circuit Court of Appeals for the Seventh circuit.

The cause now comes to this court on a certificate from the Court of Appeals, in which that court say:

"In view of the decision of the Supreme Court of the "United States in the cases of *U. S.* v. *Throckmorton*, "98 U. S., 61, and *Marshall* v. *Holmes*, 141 U. S., "598, this court is in doubt touching the case in hand, "and desires advice and instruction upon the following "question:

"QUESTION.

"Whether (assuming the bill to be in other respects "sufficient) the alleged false swearing and perjury in the "respective answers of the defendants in the original suit "in the Superior Court of the County of Cook, State of "Illinois, are in the law available in this suit as grounds "for a decree setting aside and declaring void the de-"cree so rendered in the Superior Court of the County "of Cook?"

We have already referred to the peculiar character of this bill; it contains "much verbiage, repetition and argu-"mentative matter." Counsel for appellant has inserted in his brief what he calls an "Abstract of certified facts." We understand that counsel presents this as an abstract of the bill; it can hardly be considered, however, to answer the purpose of an abstract, since it covers fifteen closely printed pages, while the printed transcript of the bill itself covers less than twenty pages of the printed record. An examination of this so-called abstract, and a comparison of the same with the original transcript, shows that such abstract is not a safe index to the record.

Among other objections it may be observed that the abstract does not set out the decree of July 8, 1889, but simply refers to it as a decree dismissing complainant's bill for want of equity; that the abstract omits to state

that the first bill, in addition to praying for a temporary injunction also prayed that on the final hearing said injunction might be made perpetual, and "that said notes "now held by the said Faurot may be ordered to be sur- "rendered up and canceled; that complainant may have "such further and other relief in the premises as shall be "agreeable to equity and good conscience." (Pr. Rec., 4.)

The abstract says that the bill sets forth the nature of the newly discovered evidence and how it was obtained, and in the body of his brief on page 43, counsel states that the bill says that certain matter appears by writing, to wit: "A contract between Faurot and Bailey to buy "the worthless stock," etc., whereas the bill itself, so far as we are able to discover, does not allege the existence or discovery of any contract in writing between Faurot and Bailey for any purpose; nor does it set out the nature of any written instrument claimed as newly discovered evidence; nor does it give the name or names or place or places of residence of any of the alleged newly discovered witnesses. The bill itself does not even state the substance of the proposed new evidence except in the most general terms. Although for these and other reasons which will suggest themselves to the court, we regard the so-called abstract as unsatisfactory and possibly misleading, inasmuch as the court must in any event consult the printed record, we do not see that any labor will be saved the court by a counter-abstract of the bill made by us, and for that reason have omitted such abstract from this brief.

I.

THE ONLY MATTER CHARGED AS FRAUD BY THE PRESENT BILL IS MATTER WHICH WAS IN ISSUE IN THE FORMER SUIT. NO EXTRINSIC OR COLLATERAL FRAUD IS CHARGED.

The bill in this suit makes out no such case as that for which counsel contends; it is a case where the complainant entered into a stock transaction, and as has happened to many others, before and since, came out a loser. His bargain did not result favorably to him. It is to be presumed that he was a man of sound mind, and he went into the transaction with every opportunity for investigation, and it must be presumed that he did investigate, to the satisfaction of his own judgment at least, before making the purchase of the stock.

The affairs of the corporation in which he became interested did not prosper as he had hoped; he was naturally disappointed, and sought to find some one whom he could make responsible for his losses. He says in his bill that about the 1st day of September, 1888 (which was more than a year after he had purchased the stock), he discovered that he had been cheated and swindled out of his money and property. On the 18th of the same month he filed a bill in equity in a court of his own choosing, at a time which pleased himself, in which he charged the defendants to the present bill with having conspired together for the purpose of defrauding and swindling him in the matter of this stock purchase. In that bill he asked for an injunction, which was granted, without notice to the defend ants, and other relief, as we have seen, was also pra yed for by this bill.

He now says to this court:

"*That at the time of filing his said bill he was absolute-*
"*ly certain that as to the matters and things set forth in*
"*said bill, that they were true.*" (Pr. Rec., 9.)

Although these defendants were not residents within the jurisdiction of the court in which that bill was filed, nevertheless they appeared by counsel, and on the 20th and 31st days of October, 1888, filed their respective answers to the bill, in which they denied all charges of fraud and all the material allegations of the bill, and offered to "aver, maintain and prove" these answers as that honorable court should direct. The court then had unquestioned jurisdiction over the subject-matter and the parties. An issue was, therefore, made by that bill and the answers thereto, and that issue included the question of whether these defendants were guilty of such fraud as would entitle the complainant to the relief prayed in the bill, and also the necessary issue of whether the answers, as well as the bill were true or false. If the bill was true the answers must have been false. If the bill was *known* to be true, the answers must have been *known* to be false. If the answers were true, the bill was false and without equity. These are the very questions that were submitted to the court for determination. There could have been no decision of the case without determining these questions. The complainant did not even file a replication to these answers, although he must have had notice of the filing of the answers before the motion to dissolve the injunction was made. The bill shows that the court on a hearing upon bill and answers, dissolved the injunction, and that nearly ten months after the bill was filed, and more than six months after the dissolution of the injunction, the court entered its decree,

which recites that on the 8th day of July, 1889, the cause coming on to be heard, the parties appeared by their solicitors respectively and the court having heard the evidence and arguments of counsel, and being fully advised in the premises, finds the equities of this cause to be with the defendants, and the case was dismissed at the complainant's costs for want of equity.

But it is asserted in the present bill that neither the complainant nor his solicitor were present at the hearing of the case, if any were had, and it is charged on information and belief, that no evidence was heard in the cause at the final hearing thereof, or argument made by counsel, so far as complainant was concerned, and that the matter was disposed of *ex parte* and without notice. It is, however, nowhere alleged in the present bill that complainant was entitled to the notice which he says was not given, nor does it appear from the bill that the alleged absence of complainant and his counsel from court, at the time the decree was entered, was the fault of the defendants, and not owing to the fault and negligence of the complainant's own counsel or himself; *nor does the bill charge any fraud in connection with these matters.*

It is claimed by the appellant that for the reasons above referred to, there was no contest and no trial of the issue. Counsel says, however, on page 68 of his brief:

"The bill alleges that the decree of dismissal was ob-
"tained without the knowledge and without notice to ap-
"pellant. We do not press this, however, because if the
"appellant had been personally present at the time and
"by reason of the fraud of the defendants, was without
"evidence to contradict these answers, the result must
"have been the same, and the bill would have been dis-
"missed."

It is not difficult to understand why counsel does not press this point. The complainant is clearly estopped by the decree and its recitals from setting up any such facts as these.

Upon this question Judge JENKINS, of the Circuit Court, in his opinion filed in this case dismissing the bill, said:

"Ordinarily, a dismissal of a bill in chancery stands "on the same footing as a judgment at law, and will be "presumed to be a final and conclusive adjudication upon "the merits whether or not heard and determined, unless "the contrary is apparent upon the face of the pleadings "or in the decree of the court. 2 Smith's Leading "Cases, 667; *Durant* v. *Essex*, 7 Wall., 107; *Tankers-"ley* v. *Pettis*, 71 Ala., 179.

"The decree upon is face purports to be a final decree "upon the merits, and in the absence of fraud this court "is not at liberty to consider whether the statements of "the decree be true or not." (Pr. Rec., 24, 25.)

The record of a decree like the one referred to and set out in the present bill, carries with it absolute verity until it is set aside by a proper proceeding, and in the face of such a decree the allegations that the bill and answer were set down for hearing by the defendants without notice to complainant (it will be noticed that the bill does not state, as counsel says in his brief that this was without the *knowledge* of complainant but simply "without notice to complainant,' and, "in his absence") and that the bill was dismissed without a hearing and in the absence of complainant's counsel and himself, and that there was no contest, are irrelevant and improper, being met by the recitals in the decree itself showing it to have been regularly entered. The record of the decree is the highest and only proper

evidence of itself and cannot be contracted by parol evidence.

Weigley v. *Matson*, 125 Ill., 64.
Garfield v. *Douglas*, 22 Ill., 102.
Douglas v. *Wickwire*, 19 Conn., 486.

Such allegations in the bill are not admitted by demurrer. The demurrer only admits the truth of the facts stated in the bill so far as they are relevant and well pleaded; it does not admit the conclusions of law drawn therefrom though they are also alleged in the bill.

Story Equity Pleading, Sec. 452, and cases cited.
Stow v. *Russell*, 36 Ill., 18.
Johnson v. *Roberts*, 103 Ill., 655.

The bill alleges:

"Your orator would further show to your Honor that "by reason of the premises and the dissolution of said "injunction for the reasons aforesaid, your orator was in- "formed by his solicitors and believed that it was not "necessary for your orator to pay any further attention "to the said case in court, unless he was able to obtain "some competent evidence tending to establish the mat- "ters and things set up in his said bill and sufficient "to overthrow the sworn answers of said respondents." (Pr. Rec., 10.)

It must be presumed, then, if complainant failed to make out the case set up in his bill, as filed, and was not present at the hearing, that his absence was owing to his own neglect or that of his solicitor.

The statutes of Illinois provide that a replication in chancery shall be filed within four days after plaintiff or his attorney shall be served with notice of answer filed,

and in default of filing such replication the case may be set for hearing upon bill and answer, in which case the answer shall be taken as proof and no evidence shall be received unless it be matter of record to which the answer refers.

Rev. Stat Ill., Chap. 22, Sections 28 and 29.

Can it be seriously contended, in such a case as this, that there had been no actual contest, when the decree had been entered in the case, after hearing in accordance with the above provisions of the statute, or would the sworn answer of a defendant in such a case be any more susceptible to a subsequent attack on the charge of fraud or perjury, than in a case where *other* evidence and witnesses were produced by one or both parties?

The complainant's bill, on its face, shows that the case complained of was such a case as this. The bill shows that the defendants filed their answers; that afterwards a motion to dissolve the injunction was made, and that such motion was heard and granted upon the bill and answers. Complainant's counsel must then have had the requisite notice, under the statute, that the answers had been filed. No replication was filed within four days after such notice, nor at any time. Complainant was advised by his solicitors that it was not necessary for him to pay any further attention to the case in court. (Pr. Rec., 10.) The bill shows that it was more than six months after the dissolution of the injunction before the decree complained of was entered on the 8th of July, 1889.

In the case of *McMullen* v. *Ritchie*, 41 Fed. Rep., 502 (United States Circuit Court, Northern district of

Ohio), the court, speaking of a case where an answer set up as a defense to a suit upon a judgment obtained in a court of another jurisdiction, that the judgment in the case was rendered in the defendant's absence and without his knowledge, said: "It is not material that the judgment in said case was rendered in the defendant's absence and without his knowledge, as he avers in his answer here, because that court had full jurisdiction of the subject-matter and of the defendant through his entry of appearance by his counsel."

On page 17 of appellant's brief it is said that the original bill called for answer under oath, and therefore the contents of the answer must be regarded as representations, and, if false, as misrepresentations to the court. Counsel attempts to make a case of extrinsic fraud by arguing further that such misrepresentations amount to an imposition and fraud upon the court and the unsuccessful party. This kind of reasoning may be ingenious, but it seems to us to be without force in this case. In the case at bar, it is not charged that the court was in any way misled or imposed upon, except by the alleged false answers. The court, however, as we have already seen, must have known that the truth or falsity of these answers was in issue, for the very reason that they disclosed a state of facts exactly opposite to the facts charged under oath in the complainant's bill. The court, of course, knew that the case was to be decided on the issues made by these pleadings. It is not charged that the defendants did any affirmative or extraneous acts in order to influence the court to make an unjust decree. When, therefore, the court entered the decree, it was in effect an adjudication that the bill did not state the truth or that the answers disclosed the true state of

facts. It is admitted by counsel in his brief (p. 23) that a party who knowingly permits the court to be imposed upon, is himself guilty of laches, and cannot afterward complain of the decree or judgment entered. If this rule be applied to the case at bar, the complainant is not entitled to the relief he seeks, because he sets out in his bill that the complainant at the time he filed his former bill, was absolutely certain that all the facts therein charged were true. That is equivalent to saying that at the time the answers were filed this complainant was absolutely certain that they were false and perjured. It is impossible then, according to his own statements, that complainant could have been imposed upon by these answers, for he at that time took the position that they were false. That was one of the matters in issue. If there was fraud, it was known to the complainant at the time.

The New York Court of Appeals, with reference to the question of when, and what, frauds are sufficient to impeach or invalidate a decree, speaking through Justice FOLGER, says: "The fraud must have been unknown "to the opposite party at the time and for not knowing "which he is not chargeable with neglect and inattention "and of which, had he known it, he could have availed "himself in the court giving the judgment."

Verplanck v. *VanBuren*, 76 N. Y., 258.

If complainant himself, then, was not imposed upon by the answer, it cannot be said that either his counsel or the court were imposed upon or fraudulently deceived or misled thereby. The machinery of that court had been put in motion by this complainant in that case. The decree was the result of his own deliberate act. After the answers were filed, it was within his power to say whether the case should go on to a decree which would bind all

the parties to it, or whether he would withdraw his bill until such time as he could "obtain some competent evi- "dence tending to establish the matters and things set "up in his said bill and sufficient to overthrow the sworn "answers of said respondents," and establish the fraud of the existence of which he claims to have been absolutely certain. It was therefore his privilege and duty, even if he was surprised by the answers, to dismiss his bill forthwith, without prejudice, and not permit the court to proceed to a final decree. It does not appear that he made any attempt at that time to compel a discovery of the evidence which he says in the bill were matters "that must necessarily in a great measure lie wholly "within the knowledge of said defendants." It does not appear that he even asked for a continuance. Having filed his bill, in which he charged certain matters as facts sworn to by himself, and having himself control of the litigation by reason of that fact, he cannot now be heard to say, after having suffered the case to proceed to a decree, that that decree is fraudulent because the defendants did not furnish him with evidence to sustain his bill against them, and because the court believed the statements in the answers, rather than those in the bill.

In the case of *Ward* v. *Town of Southfield et al.*, 102 N. Y., 287, 293, the court say:

"It would not be wise or politic to carry the rule so "far as to make it incumbent upon every plaintiff to re- "veal to the defendant any infirmity in his case and to "require every defendant to reveal to the plaintiff every "infirmity in his defense. Where there is no relation of "confidence between the plaintiff and defendant the par- "ties stand at arms' length. They come into court as "adversaries, and neither party is bound to make any

"revelation of his case to the other. The plaintiff must "be prepared to prove all the facts constituting his cause "of action, and to meet any defense which the defendant "may interpose, and the defendant must be prepared to "establish any defense which he may have."

Counsel insist upon a qualification of this general rule in the case at bar (brief for appellant, page 17) because the oath to the answers called for was not waived, and cites *Field* v. *Flanders*, 40 Ill., 474. A reference to that case discloses that the only question presented or decided by the court was whether a former judgment rendered against trustees, as such, had been entered by fraud and collusion between the trustees and the plaintiff in the action. The court properly held that if such fraud and collusion were established, equity would grant relief in favor of the beneficiaries of such trustees, *but dismissed the bill in that case, because of the failure of the complainant to comply with such rule.* It is true that in the course of its opinion the court uses the language employed by counsel, "that the law does not require a party "to disclose facts in his knowledge beneficial to the other "party, unless required to discover by answer to a bill." But this dictum does not even suggest that the failure of the defendant to discover truly by answer is such a fraud as would entitle the complainant to relief in a bill to impeach the decree for fraud. It is admitted that "the law "*does* require a party to a suit to disclose facts in his "knowledge beneficial to the other party" when required to discover by answer to a bill, just as the law requires a defendant, who is put upon the stand by a plaintiff, to testify truly as to the facts. In the one case, as in the other, if he fails so to do, perjury may be assigned. It does not follow, however, nor does this case hint at such

a proposition, that the failure of the defendant to answer truly or testify truly is a fraud extrinsic to the issues tried, such as, within the authority of the case cited, would entitle a party to relief.

Furthermore, in the case at bar the bill was not a bill for a discovery of facts not within the possession of the complainant, or resting solely in the bosom of the defendants. We have seen that the bill simply alleged and charged facts sworn to be known to the complainant as such; if the complainant in that case was without adequate proof of the facts alleged in his bill, as known to him, he should have filed a bill of discovery or in some other proper manner have called upon the defendant to produce the proofs, which he claimed he knew existed. This he did not do, nor did he, so far as the bill shows, even ask for a continuance.

Weir v. *Vale*, 65 Cal., 468.

The contention that there was no "actual contest" in the former suit, is without force, when we consider the whole of complainant's bill. When a party comes into court by a bill in equity, in which he makes charges against another party defendant and prays for a decree granting him relief against such party, and the defendant comes into court and files an answer in which he denies the allegations of the bill, in a case where the jurisdiction is unquestioned, an actual contest is thus necessarily presented before the court, which neither the defendant nor any other person, *except the complainant in the case*, can prevent from passing into a final decree upon the merits.

We conclude, therefore, that complainant's bill in this suit makes out no such case as he contends for:

First, because the decree which is set out in the bill

shows the proceedings to have been regular, and this decree cannot be questioned so far as the truth of its recitals is concerned, in the present proceeding.

Second, even if the case was heard by the court as alleged, on bill and answers, the issues of fact were before the court and it was no less an actual contest, because there may have been no evidence in addition to the sworn bill on the one side and the sworn answers on the other. The statutes of Illinois provide for just such a case as this.

Third, the bill nowhere negatives the fact that the cause might have been heard upon bill and answers in accordance with the Illinois statutes, nor does it anywhere negative the fact that the hearing might have taken place on the regular call of the calendar or docket or in some other way in which the parties would not have been entitled to any special or actual notice.

II.

A DECREE WILL NOT BE IMPEACHED EXCEPT FOR FRAUD EXTRINSIC OR COLLATERAL TO THE MATTER TRIED BY THE FIRST COURT—NOT FOR FRAUDS THAT WERE THEN IN ISSUE.

We do not wish to be understood as contending against the general proposition that fraud or collusion will vitiate a judgment or decree, and that where a proper case is made, equity will entertain a bill to set aside a decree or judgment procured by fraud, but we do contend that it is not every fraud that will produce such a result.

As was said by Mr. Justice FIELD, sitting in the United States Circuit Court for California, as long ago as 1876, in the case of *United States* v. *Flint*, 4 Sawyer, 42:

"The frauds for which courts of equity will interfere "to set aside or stay the enforcement of a judgment of a "court, having jurisdiction of the subject-matter and the "parties, must consist of extrinsic, collateral acts, not in- "volved in the consideration of the merits. They must be "acts by which the successful party has prevented his ad- "versary from presenting the merits of the case, or by "which the jurisdiction of the court has been imposed "upon."

And again, Chief Justice SHAW, in the case of *Greene* v. *Greene*, 2 Gray, 361, says:

"The maxim that fraud vitiates every proceeding "must be taken, like other general maxims, to apply to "cases where proof of fraud is admissible. But where "the same matter has been actually tried, or so in issue "that it might have been tried, it is not again admissi- "ble; the party is estopped to set up such fraud because "the judgment is the highest evidence, and cannot be "contradicted."

Herman on Estoppel, says (Sec. 393):

"The frauds for which a bill to set aside a judgment "or a decree between the same parties rendered by a "court of competent jurisdiction, will be sustained, are "those which are extrinsic or collateral to the matter "tried, and not a fraud which was in issue in the former "suit. The cases where such relief has been granted are "those in which by fraud or deception practiced upon "the party seeking relief against the judgment or de- "cree, he has been prevented from presenting all of his "case to the court, by reason of which there has never "been a real contest before the court of the subject-mat- "ter of the suit," and cites *U. S.* v. *Throckmorton*, 98 U. S., 61, which case, so far as we have been able to

shows the proceedings to have been regular, and this decree cannot be questioned so far as the truth of its recitals is concerned, in the present proceeding.

Second, even if the case was heard by the court as alleged, on bill and answers, the issues of fact were before the court and it was no less an actual contest, because there may have been no evidence in addition to the sworn bill on the one side and the sworn answers on the other. The statutes of Illinois provide for just such a case as this.

Third, the bill nowhere negatives the fact that the cause might have been heard upon bill and answers in accordance with the Illinois statutes, nor does it anywhere negative the fact that the hearing might have taken place on the regular call of the calendar or docket or in some other way in which the parties would not have been entitled to any special or actual notice.

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discover, is the leading case in this country, upon this very important subject.

This case has been followed by numerous state courts and by the Federal courts where the question has arisen, and has been applied in a number of cases similar to the case at bar.

Judge Jenkins, in his opinion in the present case dismissing the bill, was undoubtedly of the opinion that the case at bar necessarily came within the class of cases controlled by the case of *Throckmorton*. In commenting upon the case and comparing it with the case under consideration, Judge JENKINS said: "There the fraud consisted of a forged grant, accompanied by depositions of perjured witnesses, whereby, as was claimed, the court was imposed upon to render the objectionaable decree. But the Supreme Court affirmed a decree dismissing the bill, holding that the frauds for which a bill to set aside a judgment or decree between the same parties will be sustained, are those which are extrinsic or collateral to the matter tried and not a fraud which was in issue in the primary suit, and that the cases where such relief has been granted are those in which, by fraud or deception upon the unsuccessful party, he has been prevented from exhibiting fully his case, by reason of which there has never been a real contest before the court of the subject-matter of the suit. This case would seem to control action upon the present demurrer." (Pr. Rec., 26, 27.)

Judge Jenkins further said in the course of his opinion, that the case referred to has never been reversed or limited.

In *United States* v. *Throckmorton*, *supra*, Mr. Justice MILLER delivered the opinion of the court and said:

"There is no question of the general doctrine that fraud "vitiates the most solemn contracts, documents and even "judgments. There is also no question that many rights "originally founded in fraud become—by lapse of time, "by the difficulty of proving the fraud, and by the pro- "tection which the law throws around rights once estab- "lished by formal judicial proceedings in tribunals es- "tablished by law, according to the methods of the law "—no longer open to inquiry in the usual and ordinary "methods. Of this class are judgments and decrees of "a court deciding between parties before the court and "subject to its jurisdiction, in a trial which has presented "the claims of the parties, and where they have received "the consideration of the court.

"There are no maxims of the law more firmly estab- "lished or of more value in the administration of justice "than the two which are designed to prevent repeated "litigation between the same parties, in regard to the "same subject of controversy; namely, *interest rei pub- "licae, ut sit finis litium*, and *nemo debet bis vexari pro "una et eadem causa*.

"If the court has been mistaken in the law, there is a "remedy by writ of error. If the jury has been mis- "taken in the facts, the remedy is by motion for new "trial. If there has been evidence discovered since the "trial, a motion for a new trial will give appropriate re- "lief. But all these are parts of the same proceeding, "relief is given in the same suit, and the party is not "vexed by another suit for the same matter. So in a "suit in chancery, on proper showing a re-hearing is "granted. If the injury complained of is an erroneous

"decision, an appeal to a higher court gives opportunity "to correct the error. If new evidence is discovered "after the decree has become final, a bill of review on "that ground may be filed within the rules prescribed by "law on that subject. Here, again, these proceedings "are all part of the same suit, and the rule framed for "the repose of society is not violated.

"But there is an admitted exception to this general "rule in cases where, by reason of something done by "the successful party to a suit, there was in fact no ad- "versary trial or decision of the issue in the case. "Where the unsuccessful party has been prevented from "exhibiting fully his case, by fraud or deception prac- "ticed on him by his opponent, as by keeping him away "from court, a false promise of a compromise; or where "the defendant never had knowledge of the suit, being "kept in ignorance by the acts of the plaintiff; or where "an attorney fraudulently or without authority assumes "to represent a party and connives at his defeat; or "where the attorney regularly employed corruptly sells "out his client's interest to the other side—these, and "similar cases which show that there has never been a "real contest in the trial or hearing of the case, are "reasons for which a new suit may be sustained to set "aside and annul the former judgment or decree and open "the case for a new and a fair hearing. See Wells, Res "Adjudicata, Sec. 499; *Pierce* v. *Olney*, 20 Conn., "544; *Wierich* v. *DeZoya*, 7 Ill., 385; *Kent* v. "*Ricards*, 3 Md. Ch., 392; *Smith* v. *Lowry*, 1 Johns. "(N. Y.) Ch., 320; *DeLouis et al.* v. *Meek et al.*, 2 "Iowa, 55.

"In all these cases and many others, which have been "examined, relief has been granted, on the ground that

"by some fraud practiced directly upon the party seek
"ing relief against the judgment or decree, that party
"has been prevented from presenting all his case to the
"court.

"On the other hand, the doctrine is equally well set-
"tled that the court will not set aside a judgment be-
"cause it was founded on a fraudulent instrument or
"perjured evidence, or for any matter which was actually
"presented and considered in the judgment assailed.
"Mr. Wells, in his very useful work on *Res Adjudicata*,
"says (section 499): 'Fraud vitiates everything, and a
"judgment equally with a contract; that is, a judgment
"obtained directly by fraud and not merely a judgment
"founded on a fraudulent instrument; for in general
"the court will not go again into the merits of an action
"for the purpose of detecting and annulling the fraud.
"Likewise there are few exceptions to the rule that
"equity will not go behind the judgment to interpose in
"the cause itself, but only when there was some hind-
"rance besides the negligence of the defendant in pre-
"senting the defense in the legal action. There is an
"old case in South Carolina to the effect that fraud in
"obtaining a bill of sale would justify equitable inter-
"ference as to the judgment obtained thereon. But I
"judge that it stands almost or quite alone and has no
"weight as a precedent.' The case he refers to is *Crau-*
"*ford* v. *Crauford*, 4 Desau. (S. C.), 176. See, also,
"Bigelow on Fraud, 170-172."

After reviewing the cases of *Tovey* v. *Young*, Pr. Ch., 193; *Smith* v. *Lowry*, 1 John. Ch., 320; *Bateman* v. *Willoe*, 1 Scho. and Lef., 201, and citing a number of other cases, the court continues:

"But perhaps the best discussion of the whole subject

"is to be found in *Greene* v. *Greene*, 2 Gray Mass., 361, "where the opinion was delivered by Chief Justice Shaw. "That was a bill filed by a woman against her husband for "a divorce. The husband had five years before obtained a "decree of divorce against her. In her bill she alleges "that the former decree was obtained by fraud, collusion "and false testimony, and she prays that this may be in- "quired into and the decree set aside. The court was of "opinion that this allegation meant that the husband col- "luded or combined with other persons than complainant "to obtain false testimony, or otherwise to aid him in "fraudulently obtaining the decree. The Chief Justice "says that the court thinks the point settled against the "complainant by authority, not specifically in regard to "divorce, but generally as to the conclusiveness of judg- "ments and decrees between the same parties. He then "examines the authorities, English and American, and "adds: 'The maxim that fraud vitiates every proceed- "ing must be taken, like other general maxims, to apply "to cases where proof of fraud is admissible. *But where* "*the same matter has been actually tried, or so in issue* "*that it might have been tried, it is not again admissible;* "*the party is estopped to set up such fraud, because* "*the judgment is the highest evidence and cannot be con-* "*tradicted.*' It is otherwise, he says, with a stranger "to the judgment. *This is said in a case where the* "*bill was brought for the purpose of impeaching the* "*decree directly, and not where it was offered in evi-* "*dence collaterally. We think these decisions establish* "*the doctrine on which we decide the present case,* "*namely, that the acts for which a court of equity* "*will, on account of fraud, set aside or annul a judg-* "*ment or decree between the same parties, rendered by*

"*a court of competent jurisdiction, have relation to* "*frauds, extrinsic or collateral, to the matter tried by* "*the first court, and not to a fraud in the matter on* "*which the decree was rendered.*

"That the mischief of re-trying every case in which "the judgment or decree rendered on false testimony, "given by perjured witnesses, or on contracts or docu- "ments whose genuineness or validity was in issue, and "which are afterwards ascertained to be forged or fraud- "lent, would be greater, by reason of the endless nature "of the strife, than any compensation arising from doing "justice in individual cases."

On page 39 of appellant's brief there appears a paragraph which purports to be quoted from the opinion of the court in the case of *Kimberly* v. *Arms*, 40 Fed. Rep., 557, which case, counsel intimates, criticises the *Throckmorton* case. Counsel has allowed to be injected into this quotation a considerable amount of matter, even the substance of which is not to be found in the opinion.

The case of *Kimberly* v. *Arms* announces no principle which is inconsistent, or in conflict with, the case of *United States* v. *Throckmorton*, *supra*, and if it did, it could not be considered as an authority upon which the present case should be decided.

As to whether what was said in *United States* v. *Throckmorton* was *obiter dicta*, if the court will refer to page 68 of 98 U. S. Rep., where this case is fully reported, it will be found that the court in that case announced specifically the ground and doctrine upon which that case was decided, using the following language: "We think these decisions establish the doctrine *on which* "*we decide the present case, namely*, that the acts for "which a court of equity will, on account of fraud, set

"aside or annul a judgment or decree between the same "parties, rendered by a court of competent jurisdiction, "have relation to frauds, extrinsic or collateral, to the "matter tried by the first court, and not to a fraud in "the matter on which the decree was rendered."

Counsel has utterly failed to distinguish the *Throckmorton* case from the case at bar, so far as it relates to the material question now before this court. The principle and reasoning laid down in that case have never been departed from by this or any other court of respectable authority; the principle on which that decision is based is absolutely unassailable, and is exactly applicable to the circumstances of the present case. We are therefore satisfied that the case of *U. S.* v. *Throckmorton* embodies the rule of the Supreme Court of the United States; that the reasoning of the case is sound, and that it must control in answering the certified question proposed by the Court of Appeals to this court.

The Case of Marshall v. Holmes.

Counsel for appellant principally relies upon the case of *Marshall* v. *Holmes*, 141 U. S., 589, as sustaining the position taken in the present bill and says, it is the "latest case" in the Supreme Court on the subject. We cannot agree with counsel, even in his statement, that "it is a case very much on all fours with the case at bar "as to the manner in which it got into the United States "Courts." In the present case, the petition for removal filed in the state court was allowed, at once, by that court and the case removed to the United States Circuit Court, where proceedings were had which led to the dismissal of the bill. Whereas, in the case of *Marshall* v. *Holmes*,

the state court refused to allow the petition for removal to the United States Circuit Court, and the case went on appeal by successive steps to the highest court of the state in which a final judgment in the case could be had, and to this judgment of the state court, a writ of error was sued out, which brought the case before the Supreme Court of the United States, which was the first time the case had been before a United States Court.

We have given the case most careful study and consideration, but we utterly fail to perceive how that case as it came before the Supreme Court of the United States is in any way applicable to the case at bar. The case went to the Supreme Court of the United States on a writ of error to the Circuit Court of Appeals for the Second circuit of the State of Louisiana, and the material questions in the case were those relating to the jurisdiction of the court, and the question involved in the case at bar was not before the court in that case so far as the writ of error was concerned, and we maintain that the question was not there decided.

In that case a petition for injunction was filed by Mrs. Marshall, in a state district court of Louisiana, representing that Mayer, one of the defendants in error, had obtained in that court, a judgment against her for the sum of $127.50; that in pursuance of an agreement, that judgment in one suit should be decisive of other suits in the same court, between the same parties and relating to the same subject-matter, judgments had been entered against her in his favor for sums aggregating more than $3,000. Each judgment was for less than $500. The petition alleged that all the judgments were obtained on false testimony and forged documents, and that equity required that they be annuled and avoided. The relief asked for was

an injunction against Mayer and the sheriff of the parish, restraining them from executing any of the judgments; that the judgments be annuled and avoided as having been obtained upon false testimony and forged documents, and that the petitioner have general and equitable relief. Mayer appeared and filed exceptions and pleas of estoppel and *res adjudicata*.

Subsequently Mrs. Marshall filed a petition accompanied by a proper bond, for the removal of her suit into the Circuit Court of the United States, upon the ground that she was a citizen of the State of New York and that the defendants were respectively citizens of Mississippi and Louisiana. The state court made an order refusing the application for removal. The pleas were referred to the merits and ordered to stand as an answer. Upon the trial of the case, judgment was rendered, dissolving the injunction and authorizing Mayer to execute the judgments enjoined. An appeal by the plaintiff to the Supreme Court of Louisiana was dismissed for want of jurisdiction in that court to review the judgment, it being held that the appeal should have gone to the proper state court of appeals. Thereupon the case was taken to the Court of Appeals of Louisiana, where the original judgment was substantially affirmed. It was from that judgment that Mrs. Marshall prosecuted the writ of error to the United States Supreme Court.

It is readily seen from a careful reading, that the question in the mind of the court at the time this opinion was prepared, had reference to the right of removal of the case to the United States Court, and whether a Federal court could take jurisdiction of such a case on removal, and it is upon this question that the court cites the cases of *Barrow* v. *Hunton*, *Johnson* v. *Waters*, and *Arrowsmith* v. *Gleason*.

The court first takes up and decides in the affirmative the question as to whether the cause was removable, so far as the amount involved was concerned, and then proceeds to consider the nature and character of the petition with a view of determining whether the United States court could take jurisdiction on removal. The court says (p. 596):

"The case evidently *intended* to be presented by the "petition is one where, without negligence, laches or "other fault upon the part of petitioner, Mayer has "fraudently obtained judgments which he seeks, against "conscience, to enforce by execution. While, as a gen- "eral rule, a defense cannot be set up in equity which "has been fully and fairly tried at law, and although, in "view of the large powers now exercised by courts of "law over their judgments, a court of the United States, "sitting in equity, will not assume to control such judg- "ments for the purpose simply of giving a new trial, it "is the settled doctrine that 'any fact which clearly "proves it to be against conscience to execute a judgment, "and of which the injured party could not have availed "himself in a court of law, or of which he might have "availed himself at law, but was prevented by fraud or "accident, unmixed with any fault or negligence in him- "self or his agents, will justify an application to a court "of chancery.'"

A number of well known cases are here cited in support of this doctrine, among which is the case of *U. S.* v. *Throckmorton*, *supra*. It is readily seen that the court does not assume to bring the case, made by the petition upon the facts stated therein, within the general rule here laid down, but says: "The case evidently *intended* to be "presented by the petition is one, etc."

Immediately following the portion last quoted, is a paragraph of the opinion which clearly shows the only question decided in the case to have been that of jurisdiction. That paragraph is as follows:

"But it is contended that it was not competent for the "Circuit Court of the United States, by any form of de- "cree, to deprive Mayer of the benefit of the judgments "at law; and that Mrs. Marshall could obtain the relief "asked, only in the court in which the judgments at law "were rendered. Is it true that a Circuit of the United "States, in the exercise of its equity powers, and where "diverse citizenship gives jurisdiction over the parties, "may not, *in any case*, deprive a party of the benefit of "the judgment, fraudulently obtained by him in a state "court, the circumstances being such as would authorize "relief by the Federal court, if the judgment had been "rendered by it and not by the state court?"

Then follows in the opinion of the court, a review of the cases of *Barrow* v. *Hunton*, *Johnson* v. *Waters* and *Arrowsmith* v. *Gleason*, which are here reviewed by the court and cited, merely for the purpose of settling the question of jurisdiction of a Circuit Court of the United States, in a case like the one which had been passed on by the state court of Louisiana. All the reasoning employed by the court in this opinion, is directed to the proposition that the state court of Louisiana erred, in not allowing the removal of that case to the Circuit Court of the United States, on the petition and bond of the plaintiff in error, Mrs. Marshall.

After concluding the review of the authorities cited for the above named purpose, the court continues the opinion in the following language:

"These authorities would seem to place beyond question

"the jurisdiction of the Circuit Court to take cognizance "of the present suit, which is none the less an original "independent suit, because it relates to judgments ob- "tained in the court of another jurisdiction. While it "cannot require the state court itself to set aside or va- "cate the judgments in question, *it may*, as between the "parties before it, *if the facts justify such relief*, ad- "judge that Mayer shall not enjoy the inequitable ad- "vantage obtained by his judgment. A decree to that "effect would operate directly upon him, and would not "controvene that provision of the statute prohibiting a "court of the United States from granting a writ of in- "junction to stay proceeding in a state court. It would "simply take from him the benefit of judgments obtained "by fraud."

It will be seen that the court by this language simply decides that the Circuit Court of the United States, had, or would have had, jurisdiction to take cognizance of the suit, and to use the language of the court; "if the facts "justify such relief, adjudge that Mayer shall not enjoy the "inequitable advantage obtained by his judgments."

The court does not decide that the facts in the case *did* justify such relief, and does not order such relief to be given.

Counsel, on page 32 of the brief, purports to give the closing part of the opinion in the case of *Marshall* v. *Holmes*, but fails to give the whole of the paragraph which he starts to quote, and omits, entirely, the last pargraph of the opinion which shows, in exact language, what the decision of the court was, and what questions were covered by the decision. The closing portion of the opinion is as follows:

"While the court upon final hearing would not per-
"mit Mrs. Marshall, being a party to the actions at law,
"to plead ignorance of the evidence introduced at the
"trial, *it might be*, that relief could be granted by reason
"of the fact, distinctly alleged, that some of the necessary
"proof establishing the forgery of the letter was dis-
"covered after the judgments at law were rendered, and
"after the legal delays within which new trials could
"have been obtained, and could not have been discovered
"by her sooner. It was not, however, for the state court
"to disregard the right of removal upon the ground sim-
"ply that the avermerts of the petition were insufficient
"or too vague to justify a court of equity in granting the
"relief asked. The suit being, in its general nature,
"one of which the Circuit Court of the United States
"could rightfully take cognizance, *it was for that court,*
"*after the cause was docketed there, and upon final hear-*
"*ing, to determine whether, under the allegations and*
"*proof, a case was made which according to the*
"*established principles of equity, entitled Mrs. Marshall*
"*to protection against the judgments alleged to have been*
"*fraudulently obtained.*

"For the reasons stated, we are of opinion that this suit
"was removable from the state court; and the court be-
"low should have reversed the judgment of the Eighth
"District Court in and for the Parish of Madison, and
"remanded the case to the latter court, with directions to
"set aside all orders made after the filing of the petition
"and bond, for the removal of the suit into the Circuit
"Court of the United States, and to proceed no further
"in it.

"The judgment is reversed and the cause remanded
"for such proceedings as are consistent with this
"opinion."

It therefore plainly appears that the court does not decide in this case that the particular relief asked for should have been granted, but simply that such a case was made by the bill as would give the Circuit Court of the United States jurisdiction, on removal from the state court. The court says, "*it might be that relief could be granted*," and further, the suit being one, in its general nature, of which the Circuit Court of the United States could rightfully take cognizance, it was for that court, after the cause was docketed there and upon final hearing, *to determine whether*, under the allegations and proof, a case was made which, according to established principles of equity, entitled Mrs. Marshall to protection against the judgments *alleged* to have been fraudulently obtained. It is then stated that the court is of the opinion that this suit was removable from the state court; that the court below (the Louisiana Court of Appeals) should have reversed the judgment of the lower state court, and remanded the cause to that court with directions to set aside all orders made after the filing of the petition and bond, for the removal of the suit into the Federal court and to proceed no further.

That order of the Supreme Court of the United States, when carried out, would have left the case of *Marshall* v. *Holmes* in the Circuit Court of the United States, and the questions raised in the bill or petition remained to be passed on by that court, if ever determined.

The sole question that by any possibility could have been presented was: Had the state courts jurisdiction of the cause after the petition and bond for removal were filed in the court below? The Supreme Court of the United States, for the purposes of that case, was only a court of review. If the state courts had no jurisdiction, the

Supreme Court of the United States was powerless to inquire into a single question presented by the record, other than the question of jurisdiction. It could not say whether the other rulings of the trial court or any decision of the Supreme Court of the state upon the other questions presented by the record in the case, other than that of jurisdiction, were correct or not. The court was as absolutely without power to inquire into those questions, as was the trial court before whom the petition for removal was presented. There was but one court in all the world that could answer the question of whether or not a case was made calling for relief on the original petition, and that court was the Circuit Court of the United States for that district. The statute conferring jurisdiction upon the United States Circuit Courts, and providing for removal of causes from the state courts, provided in effect that "any civil suit," where the amount involved was in excess of $500, and where there was the requisite citizenship, might be removed into the United States Court. The law did not provide that any suit in which a good case was made by the pleadings, might be removed into the United States Court; for that would have frustrated the very purpose of the statute. The only question, therefore, that the Supreme Court of the United States was called upon to decide in *Marshall* v. *Holmes*, and which it did decide, was whether or not the suit was an original, civil suit, involving more than $500. Suppose, for the sake of illustration, any case in which the bill or declaration is obnoxious to a general demurrer, and the suit is sought to be removed into the United States Circuit Court, the case complying with the statute as to amount and citizenship. A state court cannot inquire into the sufficiency of the pleadings, nor can the United States

Court upon a motion to remand. Its sole inquiry is limited to whether or not the suit is an original, civil suit; not whether it is a civil suit that can be maintained. The text of the decision in *Marshall* v. *Holmes* should be read with this distinction constantly in mind.

Whatever this court may see fit to do in regard to upholding its former decision and opinion in the case of *United States* v. *Throckmorton*, it cannot be said that the case of *Marshall* v. *Holmes*, in any manner limits or reverses the rule as laid down and applied in the former case, nor have we been able to find a decision of any court since the case of *Throckmorton* was decided in which the questions there considered were involved, which is not in perfect consonance and accord with that decision.

Among the decisions of other courts in which the *Throckmorton* case has been followed and approved, we desire to call attention to the recent case of *Pico* v. *Cohn*, 91 Cal., 129 (decided in 1891), in which case the court said: "We cannot find any substantial ground by which "this case can be distinguished from *U. S.* v. *Throck-*"*morton.*" The facts in the case are concisely stated in the opinion, the material portions of which are as follows:

"This is a suit in equity to vacate and annul a final "decree in another action between the same parties on "the ground that it was procured by fraud. The Su-"perior Court sustained a demurrer to the complaint, "and thereupon gave judgment for the defendant from "which the plaintiff appeals. The principal question "presented by the appeal, and the only question we find "it necessary to consider, is whether the complaint, "taken as true, presents a case entitling the plaintiff to "the relief demanded, or to any relief. * * *

"At the date of the original transaction with Cohn, "Pico was an old man over eighty years of age, unable "to speak or understand the English language, unused "to complicated statements or accounts, easily deceived, "and in great distress and trouble regarding his business "affairs. He confided in Cohn, relied upon him im- "plicitly, and at his solicitation abstained from consulting "his usual legal advisers. In the conduct of the nego- "tiations with Cohn the only other person present was "one Pancho Johnson, who knew everything that took "place, and well knew that the transaction was "a loan and security, and not a purchase and "conveyance absolute; and shortly after the execution of "the deed, so stated in the presence of Pico's attorneys "and numerous other persons. Relying on Johnson's "knowledge of the transaction, and his statements con- "cerning it, Pico called him as a witness on the first trial "of the action to redeem, when, instead of testifying that "the transaction was a loan and mortgage, he testified "that it was a sale and absolute conveyance; but in spite "of his adverse testimony, the court, as above shown, "found for the plaintiff. Before the cause came on for "trial a second time, Johnson was dead; but his testimony "as given on the first trial, had been reduced to writing, "and was on file among the papers in the case. Plaintiff "and his counsel knew that this testimony was false in "its general statement, to the effect that the conveyance "to Cohn was absolute, and they suspected that Cohn had "bribed the witness to so testify, but they had no evi- "dence of such bribery, although they had used the ut- "most diligence to discover it. Upon mature considera- "tion, they decided at the second trial to put in evidence "the written transcript of Johnson's testimony at the first

"trial. * * * But contrary to their expectations, the "court believed his false testimony, and for that reason alone "decided against the plaintiff. In support of this conclu- "sion the complaint sets out the substance of all the tes- "timony of Cohn and Pico and in detail the material por- "tions of Johnson's testimony, from which, with other "averments, it appears that but for Johnson's positive "perjury and suppression of the truth, the judgment "here in question would not have been given. This be- "ing shown, it is next alleged that after the final affirm- "ance of that judgment by this court, plaintiff made the "discovery that Cohn had paid Johnson two thousand "dollars to testify falsely. The particulars of this brib- "ery and its discovery are detailed in the complaint and "show that on the very morning that Johnson gave his "testimony, Cohn placed two thousand dollars in the "hands of one Forbes, with directions given in Johnson's "presence, to pay it to him if he testified to an absolute "sale, and that immediately after he had so testified, he "demanded and received the money.

"*It is averred and we think sufficiently shown, that "upon proof of these facts, there is a reasonable "certainty that plaintiff would upon another trial gain "his cause.* Such being the case, is plaintiff entitled to "a decree vacating and annulling the former decree on "the grounds that it was procured by fraud? After a "careful and extended examination of the authorities, "we are constrained to answer this question in the nega- "tive. That a former judgment or decree may be set "aside and annulled for some frauds there can be no "question, but it must be a fraud extrinsic or collateral "to the question examined and determined in the action. "And we think it is settled beyond controversy that a

"decree will not be vacated merely because it was ob-
"tained by forged documents or perjured testimony.
"The reason of this rule is that there must be an end of
"litigation; and when parties have once submitted the
"matter, or have had the opportunity of submitting it
"for investigation and determination, and when they
"have exhausted every means for reviewing such deter-
"mination in the same proceeding, it must be regarded
"as final and conclusive, unless it can be shown that the
"jurisdiction of the court has been imposed upon, or
"that the prevailing party by some extrinsic or collateral
"fraud has prevented a fair submission of the contro-
"versy. What then is an extrinsic or collateral fraud
"within the meaning of this rule? Among the instances
"given in the books are such as these: Keeping the un-
"successful party away from the court by a false promise
"of a compromise, or purposely keeping him in igno-
"rance of the suit; or where an attorney fraudulently
"pretends to represent a party and connives at his de-
"feat, or being regularly employed, corruptly sells out
"his client's interest. *United States* v. *Throckmorton*, 98
"U. S., 65, and authorities cited. In all such instances the
"unsuccessful party is really prevented by the fraudu-
"lent contrivance of his adversary from having a trial;
"but when he has a trial he must be prepared to meet and
"expose perjury then and there. He knows that a false
"claim or defense can be supported in no other way; that
"the very object of the trial is, if possible, to ascertain
"the truth from the conflict of the evidence, and that nec-
"essarily the truth or falsity of the testimony must be
"determined in deciding the issue. The trial is his op-
"portunity for making the truth appear. If, unfortunately,
"he fails, being overborne by perjured testimony, and

"if he likewise fails to show the injustice that has been "done him, on motion for a new trial, and the judgment "is affirmed on appeal, he is without remedy. The "wrong in such case is, of course, a most grievous one, "and no doubt the legislature and the courts would be "glad to redress it if a rule could be devised that would "remedy the evil without producing mischiefs far worse "than the evil to be remedied. Endless litigation, in "which nothing was ever finally determined, would be "worse than occasional miscarriages of justice; and so "the rule is that a final judgment cannot be annulled "merely because it can be shown to have been based on "perjured testimony; for if this should be done once, it "could be done again and again, *ad infinitum*. But coun-"sel for appellant seek to distinguish this case from those "in which it has been held that a judgment will not be "set aside by reason of its being based upon forged "documents or perjured testimony. They say that the "fraud committed by Cohn was the bribing of John-"son; that this was collateral and extrinsic; that it was "not and could not have been the subject of investiga-"tion at the trial of the original action. We do not "think this distinction can be maintained. The fraud "which Cohn committed was the production of perjured "evidence in support of his defense. The means by "which he induced the witness to swear falsely was but "an incident. It may be safely asserted that a witness "does not often deliberately perjure himself without be-"ing induced thereto by some fraudulent or corrupt prac-"tice on the part of him who gets the advantage of the "perjury. It is a matter of indifference what particular "form such corrupt practice takes. The evil and the "wrong is in the perjury which follows. In this case the

"truth of Johnson's evidence was necessarily drawn in "question at the trial and determined by the decision of "the court; and all that has since been discovered is an- "other item of testimony bearing on that point. We "cannot find any substantial ground upon which this case "can be distinguished from *U. S.* v. *Throckmorton*, "*supra*. * * *

"We think, on the whole, that it is settled by the great "weight of authority that the plaintiff's action cannot be "maintained, and that the judgment of the Superior Court "must be affirmed."

After the foregoing opinion was filed the court granted a rehearing of the case, which was re-argued, and the court, upon further consideration, adhered to its opinion as given above.

See, also,

Cotzhausen v. *Kerting*, 29 Fed. Rep., 821.
Hilton v. *Guyott*, 42 Fed. Rep.,252.
U. S. v. *White*, 17 Fed. Rep., 561.
U. S. v. *Hancock*, 30 Fed. Rep., 858.
Vance v. *Burbank*, 101 U. S., 514.
N. Y. Central R. R. Co. v. *Harrold*, 65 How. Pr., 89.
Zellerback v. *Allenberg*, 67 Cal., 298.
Allen v. *Curry*, 41 Cal., 321.

On page 24 of his brief, counsel seems to assume this case is governed by the law of Illinois, and not by the general law of the country as determined by the United States Courts, and that the strict doctrine has been relaxed in Illinois. It may be answered that the rule in Illinois is not as counsel contends, and that, if it were so, the decision of the Supreme Court of the United States must control.

Counsel cites a number of cases where a new trial was granted because the judgment was rendered upon the subborned testimony of witnesses. These are all cases of new trials, as such, and have absolutely no application to the question under discussion. It is largely within the discretion of a trial judge or of a chancellor to grant a new trial or a rehearing, if he is satisfied that injustice has been done; but a very different question is presented when it is sought in an original proceeding to impeach the judgment or decree finally rendered by him. In the former case the cause or suit is not finally determined until the time has passed within which the judge may grant a new trial. The case is still in the bosom of the court. The reason of the rule, therefore, that the repose of society requies an end of litigation, does not apply in such a case.

It will be noted that all of the cases cited by counsel, in which relief has been granted, no one of which, however, we insist is in conflict with the *Trockmorton* case, and indeed, all the cases that can be found in the books, are cases in which the moving party practiced the fraud. Those cases in which, with a fraudulent purpose, the machinery of the courts of justice is set in motion for the very purpose of recovering a fraudulent and unconscionable decree or judgment, are materially different from cases in which a judgment or decree has been rendered in favor, not of the moving party, but the party who appears in pursuance of the commands of the court, to resist claims which have been made against him. In the former case, the very purpose of the litigation is a fraud. The complainant or plaintiff willfully invokes the aid of the court to assist him perpetrate that fraud. In the latter the defendant asks nothing, sets into motion the machinery

of no court, requires of it no aid, but only appears as he must, to resist the demands made upon him. In the former class of cases, the complainant chooses his own time for the institution of the suit, makes his charges, and must be held in law to know that he will be called upon to maintain those charges, or fail in his suit. The litigation is within his own control, the court pronounces its decree because he asks it, and if that decree is adverse to him, he ought not to be permitted to re-litigate the same question. In the case at bar, the bill was filed, the answers came in, and it appears that there was a hearing upon the merits of the controversy upon a motion to dissolve the injunction which had been procured. The injunction was dissolved, and the bill in this case states that the complainant's solicitor advised him that it was unnecessary for him to pay any further attention to the case in court. After this, the suit was pending six months. The court was permitted to go on and render a final decree in the case, although it was completely within the power of the complainant to have dismissed his bill, without prejudice, at any time during that period. The case is far different where a complainant files a perjured bill supported by suborned testimony, selecting a time when he knows his adversary cannot meet his false charges, and presses that bill against the defendant to a final unconscionable decree in his favor. In that case the defendant would have no choice. He could not discontinue the proceedings. The machinery of the courts would not be under his control, and the decree would be rendered *in invitum* against him. In the case at bar Faurot asks for no execution founded upon any judgment, or any decree; he asks no process from any court; he has not, nor does he now seek to employ the decree complained of to further any scheme of

his. It is true that it appears from the bill that he has brought suit on certain promissory notes, a part of the subject-matter of the former litigation, and that he has replied *res adjudicata* to a plea of fraud. All he says is, you cannot re-open or re-litigate that question; that issue has been tried, at a time of your own selection, in a forum of your own choice, and it has been solemnly adjudicated in accordance with the due and orderly administration of justice, that there was no fraud.

Let us examine the consequences of the doctrine for for which counsel contends. Suppose in the very case at bar, the demurrer be overruled, the defendants answer and reiterate their innocence, and a hearing is had which results in a decree dismissing the bill for want of equity. Suppose that five years hence the complainant files another bill, in which he charges that the answers to the present bill are false, and that he has since discovered documentary proof which indubitably shows such fact. He would be permitted again to require answers from the defendant, and another marshalling of proofs, and there would be no end of this very litigation.

For the repose of society, the rule must be rigidly adhered to, that fraud which will vitiate a judgment or a decree must consist of extrinsic, collateral acts not involved in the consideration of the merits.

FRANK L. WEAN,
FRANK O. LOWDEN,
Counsel for Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

No. 779.

WILLIAM GRAVER, *Appellant*, vs. BENJAMIN C. FAUROT, *Appellee*.		On Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR APPELLANT.

BY

ROBERT RAE.

The appellee's brief was not filed three days before the day the case was set down by order of the court for submission, but was furnished by counsel on Saturday afternoon preceding the first Monday in February, the day on which it was filed in this court. Under these circumstances the appellant asked permission to file this reply brief.

I.

It is claimed at page 3 of appellee's brief that the decree recites:

"That the case coming on for hearing to be heard, "came the parties thereto by their solicitors, respectively, "and the court heard the evidence, arguments of coun- "sel, etc., finds the equities to be with the defendant."

That under this recital the appellant is clearly estopped by the decree from setting up any facts contradicting this recital. This is found at page 10 of appellee's brief.

At pages 10 and 11 it states that:

"The decree upon its face purports to be a final de-
" cree upon the merits, and, in the *absence* of *fraud*,
" this court is not at liberty to consider whether the state-
" ments of the decree be true or not."

The answer to these several positions, each characterizing the other, is, that this is a direct proceeding to set aside the decree for fraud, and not to contradict the recitals in the decree. It is on account of the conclusiveness of the decree that the appellant is driven to a bill in the nature of a bill of review to set aside this decree, as having been obtained by fraud. It comes within the exception stated in the appellee's position, that it is only in cases where there is an absence of fraud that this court is not at liberty to consider whether the statements of the decree be true or not.

The case of *Durant* v. *Essex*, 7th Wall., 107, quoted to sustain appellee's position, was not a case by bill to set aside a decree for fraud.

II.

Appellee contends that, " The Statutes of Illinois pro-
" vide that a replication in chancery shall be filed within
" four days after plaintiff or his attorneys shall be served
" with notice of answer filed, and in default of filing such
" replication, the case may be set for hearing upon bill
" and answer, in which case the answer shall be taken as
" proof and no evidence shall be received unless it is
" matter of record to which the answer refers." (Appellee's brief, 12.)

In answer to this appellant says, his bill, by inadvertency or oversight, did not set forth that a replication was filed to these answers; as the pleadings must be taken most strongly against the pleader, the appellee contends that no replications were filed. The decree recited, however, as we have seen, that the case was heard upon *the evidence.*

Without a replication the case is not at issue, but if the parties proceed to trial upon evidence without such replication being filed, the replication is deemed to have been waived.

The 32nd section of chapter 21, title "Chancery" of Illinois, provides: "That after replication is filed the "case shall be deemed at issue." The Supreme court in construing this statute has decided that the case is not at issue until the replication is filed.

If both parties, however, set the case down to be heard on bill, answer and proofs, then the replication is waived. In the case at bar the defendant set the case so down, but the bill alleges and the demurrer admits it, that the complainant did not join with him in so doing.

Hence, on the hearing of such a case procured by the defendant alone, the case was not at issue so far as the complainant was concerned. If the defendant wished to have it set down on bill and answer, then the complainant could, upon notice given by the defendant of the filing of his answer, waive the replication and permit the case to be set down for trial on bill and answer. If the case was not at issue for want of a replication, and for the absence of that which would waive a replication, then the case cannot be said to have been actually tried upon issue joined.

Corbus et al. v. *Teed*, 69 Ill., 206.

Marple v. *Scott*, 41 Ill., 50.
Stark v. *Hillibut*, 19 Ill., 344.
Webb v. *The Alton, etc.*, 5 Gilm., 223.
Jameson v. *Conway*, 5 Gilm., 227–230.

The evidence, however, whatever it was, is not contained in the record unless the answers constitute the evidence. In chancery cases the evidence must appear in detail.

Greene's heirs v. *Breckenridge's heirs*, 4th T. B. Monroe, 544.
Webster v. *Reid*, 11 Howard, 416.

There is nothing in the record to sustain the decree.

The bill charges, however, that there was no evidence received by the court, and the demurrer admits this if the recital is not conclusive. A recital "that due proof "was made" is only *prima facie* evidence of the fact.

King v. *Emden*, 9th East, 437.
Bickerdike v. *Allen*, 157 Ill., 106.

If this is so as to this recital, then it is well charged and pleaded in the bill, that no evidence was received by the court, and hence no actual trial, and a demurrer will admit what is well pleaded.

In Throckmorton case, notwithstanding the decree, the court inquired whether the fraud complained of was the subject of inquiry under the issue, and for this purpose they did not look at the decree or the pleadings, but the evidence. The court found from the evidence that the fraud complained of was actually tried in a litigation covering in time four years, and, therefore, to reopen the case was to re-try what had been actually and in fact, and not by way of presumption, tried.

III.

The appellee contends that perjury in the forming of the issue is perjury in the trial of the case, because the answer may be used as evidence in the trial of the cause. This begs the question whether there was an actual contest, and the court, after having considered the evidence offered in this contest, decided the issue.

IV.

At page 14 of appellee's brief the point is made that, "The appellant is not entitled to the relief he seeks, because he sets out in his bill that the appellant at the time he filed his former bill was absolutely certain that the facts therein charged were true."

This is not a good answer, for, while the complainant may know the facts to be true, and swears to their existence in his bill, he may not have evidence to establish them, unless the defendant will, when his conscience is explored, make true answers responsive to the bill, and thus furnish the evidence which the complainant is seeking. Under such circumstances, the complainant has a right to rely that the defendant will make true answers to such material parts of the bill as he is required to answer, and that the defendant will not commit perjury in these answers.

The appellant is not imposed on by such false testimony, when it appears in an answer, he knows it is false, but by the *suppression* of the evidence by the *defendant*, he is unable to establish his right. He may, and, no doubt, is, absolutely certain that the defendant has committed perjury, but the only proof within his power was

to get at the conscience of the defendant, and if the defendant, when he does so, by his own guile and false swearing, deprive him of the truth, he is guilty of suppression of the truth and an imposition upon the complainant. He is also guilty of an imposition upon the court.

V.

The appellee says, at page 17, that "The bill at bar "is not a bill of discovery of facts not within the posses- "sion of appellant, or resting solely in the bosom of the "appellee."

The answer to this is, that at the time appellant filed his bill the proof lay solely in the bosom and bank box of the appellee, and it was not until within a few days before filing this bill that he was, through the examiner of the United States banks, able to discover that he could prove his case and disprove the answer by papers and writings which had been, and were at the time of filing the answer, in the possession of appellee at the time he filed his answer to the original bill.

All bills in equity that ask for a sworn answer of the defendant are bills of discovery as well for relief though used in the pending case. In an action at law and a bill of discovery is filed on the equity side of the court to obtain evidence, it is evidence not to be used in the case of the bill filed for discovery, but filed to obtain evidence to be used at the trial of the case pending at law. In such a case the bill in equity is auxiliary to the action at law.

The case of *Weir* v. *Vale*, 65 Cal., 468, quoted by appellee, was an action at law, and the defendant in trying this case failed to file a bill of discovery to obtain evidence to support his case at law. Under such circum-

stances it was his own laches that he was not able to establish his case, if it could alone be established through the means of a bill of discovery.

VI.

Appellee says that there was no actual contest, because the appellee obtained the decree upon the answer of the defendant, and relies on the case of Throckmorton. The language of this court is in that case: "That the court will "not *retry* a case in a case in which a *trial* has been "had which has *presented* the claims of the parties, and "where *they have received the consideration of the court.* "But these and similar cases, which show that there has "never been a *real* contest in the *trial* or hearing of the "case, are reasons for which a new suit may be sustained "to set aside and annul the former judgment or decree "and open the case for a new and fair hearing." (Quoting other cases.)

VII.

Marshall v. *Holmes.*

Appellee contends that the facts in the case of Throckmorton, and the facts in the case of *Marshall* v. *Holmes*, are not alike as to the fraud committed. Judge JENKINS evidently thought otherwise. (See opinion.)

At page 29 of appellee's brief it is contended that the case of *Marshall* v. *Holmes*, only considered and decided a question of jurisdiction, and was not a decision that if the facts intended to be presented by the bill were true, the plaintiff in error could have relief.

The learned justice who delivered the opinion of this court in this case is not given to writing folios on imma-

terial matter, or in indulging in irrelevant platitudes. The court does decide that the courts have jurisdiction to hear and determine whether the facts set up in Mrs. Marshall's case, of a judgment obtained by perjury and forgery, and which question was not on *actual* trial in the trial, and considered by the trial court, a case not fully and fairly tried at law.

Jurisdiction is to hear and determine. If the court could not hear the pleaded facts for want of jurisdiction, they could not determine the case.

If the court could not inquire that the facts as stated justified the relief sought for, why remand the case to the court below at all?

The court could have cut short the case by saying, that the facts stated in the bill, if true, were facts not extrinsic to the case adjudged, and therefore could not be considered in a bill filed to set aside the judgment on the grounds that the judgments were obtained by perjury and forgery; that this could not be done in any court of equity, state or federal. The reason why the case was remanded for the court below to hear and determine, was because the decree below was reversed and the case being on demurrer, the defendant could file an answer and traverse the facts stated in the bill. But, suppose the defendant chose to stand by his demurrer? Did not the Supreme court mean to say that the plaintiff in error on the facts stated in her bill, was entitled to relief, and that the defendant ought not to enjoy the fruits of his perjury and forgery in obtaining the judgment? What did the court mean by announcing that: "It is the settled doctrine "that any fact which clearly proves it to be against con- "science to execute a judgment, and of which the in- "jured party could not have availed himself in a court of

" law, or of which he might have availed himself at law,
" but was prevented by fraud or accident, unmixed with
" any fault or negligence of himself or his agents, will
" justify an application to a court of chancery"?

Is it not against conscience to execute a judgment obtained by the suppression of evidence by means of the perjury of the defendant in his answer just to him by the court, and which made one of the pleadings in the formation of an issue?

If Mrs. Marshall could have had no relief on the case as stated by her, why remand the case for the court below to take jurisdiction to hear and determine whether the facts as she presented them, and were upon an answer being filed, true or false, and if true, that she would be entitled to the relief prayed for?

VIII.

Pico v. *Cohn*, 91 Cal., 129.

The appellee, at page 35 of counsel's brief, rely on this case as a strong case to support their contention. It is indeed a strong case—a very *strong* case.

The Supreme court of California in deciding this case confesses that the wrong was a grievous one, and that no doubt a court should be glad to remedy the evil. The facts certainly justify this regret.

The plaintiff was an old man past eighty years of age, unable to speak and understand the English language, unused to complicated statements or accounts, easily deceived, and in great distress and trouble regarding his business affairs. He confided in the defendant, relied upon him implicitly, and at his solicitation abstained from

consulting his usual legal advisers. That the medium through which the negotiations were conducted, and the only person other than the parties who knew the facts, when called upon by the plaintiff at an actual trial of the case, committed perjury at the subordination of the defendant, and had received immediately after a consideration by reason of a previous arrangement made by the defendant, of $2,000 to so falsely testify. Had the fact of the perjury appeared after the trial and judgment, no one would have doubted that a court of equity would, upon the facts coming in, set the judgment aside. But, alas! the plaintiff used the same witness' testimony at a second *actual* trial and contest, in which he knew of the perjury, but did not know of the consideration which the defendant had given for it. He was induced, among other reasons, to use the testimony because he hoped by other facts, stated in the testimony of the witnesses, that the court would reject this portion of the testimony containing the perjury and give credence to other material portions of it favorable to the plaintiff. He had, therefore, an actual contest over the truth of this witness' testimony, not by calling other witnesses to contradict him, but relying on the whole of the statements made by the witness in his evidence to contradict himself. The court considered the whole of this evidence, not in the forming of an issue, as in the case at bar, but in the trial of the case, and found adversely to the plaintiff. The plaintiff himself offered the witness, knowing that his evidence was false, but took his chances from the whole of the evidence that the court would receive what was favorable to the plaintiff and reject that which was false and unfavorable to him.

The court held that, under the rulings in Throckmorton

case, the plaintiff was deprived of all relief, that notwithstanding the proof was ample, the defendant on the very day of the first trial gave the witness $2,000 to foreswear himself, and that the proof of this did not come to the plaintiff until after the second trial and judgment, yet it was not a fraud extrinsic to the obtaining of the judgment and not an imposition on the court. The court says, "that if an attorney corruptly sells out his client's interest, this is not a fraud in the case, but a fraud extrinsic to it," but the court says, in effect, that the purchasing of the plaintiff's witness to corruptly swear the plaintiff's case out of court is a fraud not extrinsic or collateral to the question examined and determined in the action.

The distinction is a fine one, and has the bad merit of leaning towards vice's side. If the case of Throckmorton established the rule in its plenary sense and application, and breeds such progeny as this, the sooner it is qualified and explained by this honorable court the better. The principles of equity have made but little progress, if this is the law, as contended for by the appellee. That it is not, is demonstrated by the decision of this court in the case of *Marshall* v. *Holmes*. If it is law, then it would be better to establish courts of law to correct that which equity, by reason of its decrepitude, is unable to reach.

The grounds upon which the Supreme court puts its incapacity to right, in a court of equity, a wrong which is a crime, is for the purpose of the repose of society.

It is strange that in California, where a rustic and plain sense of justice is so active, and its means of vindicating justice is so drastic, that, in the case stated by the court, that society was not called upon to pray for the *repose* of the soul of the blaspheming subordinator of perjury, rather than looking after its own repose. The

circumstance that the injured party was past eighty years of age and very infirm, and as a consequence did not use a shotgun, may explain why he had to resort to paper bullets in order to seek relief. Both the Spanish and French laws punish perjury and subordination of perjury with death.

IX.

On page 40 of counsel's brief it is said that appellant's counsel, in his brief at page 24, seems to assume this case is to be governed by the laws of Illinois (*i. e.* in reference to the force and effect of judgments rendered in her courts) and not by the general law of the country.

It is the settled law of the State of Illinois that judgments obtained by perjury in the trial may be set aside, in a case where a party has made every effort within his power to discover evidence and fails, when afterwards discovered, courts of equity treat this as an accident, and will, when satisfied that such newly discovered evidence would have produced a different result if it had been known in proper time, and that the judgment is unjust, grant a new trial.

Brown v. *Luehrs*, 95 Ills., 195.

These rulings are part of the law of judgments and decrees in the State of Illinois. The case at bar is a case of an Illinois decree. In the same court where it was rendered the appellant filed his bill to set aside the decree as having been obtained by fraud in this,—the perjury of the defendants in their answer, which went, in part, to make up the issue.

Appellant had at the time of filing his bill, all the rights which the laws of Illinois gave him fixing the *status* and public policy of the state, as to the force and effect of decrees and judgments obtained by perjury.

It is contended that the defendant cannot deprive him of these rights by merely a change of *forum*, by removal of a case to a Federal court. These latter courts are for such purpose *pro haec vice*. State courts (*Chicago etc., R. R. Co.* v. *Whitton*, 13 Wall 270), and they will enforce the primary right as distinguished from the remedial right, which is but *viis et modus*, to enforce the primary right. This principle places the United States Courts, in cases of removal, upon identically the same footing as the State court in which the judgment was rendered, so far as the conclusiveness of such judgment is concerned. The chancelor who rendered the decree in the original case upon these perjured answers, presumably at least, did so, with the understanding that his decree would be subject to be set aside in any State court of Illinois, if evidence was afterwards discovered within the rule established by the Supreme Court of Illinois—that the decision was procured through perjured testimony, if the facts would have justified it.

Cowley v. *N. P. Ry. Co.*, 159 U. S., 569, at page 582, quoting for its support *Marshall* v. *Holmes supra*:

Cowley's case was a bill in the United States court by removal from a Territorial court, commenced under a special statute by petition, and to set aside a decree alleged to have been obtained by fraud. The court says:

"But while, after the removal of the case to the Circuit "court of the United States, * * * it shall remain, "so far as the rights of the plaintiff were concerned, a "special proceeding under the territorial statute; and the "powers of the court were gauged, not merely by its "general equity jurisdiction, but by the special author- "ity vested in its own courts by the statutes (and it

"might be added decisions of the Supreme court con-
"struing them) of the territory. Had the case never
"been removed to the Circuit court it would have pro-
"ceeded as a special proceeding under the territorial
"statute, and we are of an opinion that, upon its re-
"moval to the Circuit court petitioner lost no right to
"which he would have been entitled had the case not
"been removed. * * * While the Federal court
"may be compelled to deal with the case and according
"to the forms and proceedings of a court of equity, it
"remains in substance a proceeding under the statute
"with the original rights of the parties unchanged."

Brown v. *Luehrs*, *supra*.

The provision in the Federal Constitution (Art. 4, Sec. 1), which provides that the judgments in the state are to be accorded precisely the same force and effect, but none other, than if the judgment had been rendered in the state where the judgment is sought to be established, applies and is binding on Federal as well as State courts. It must be conceded that if the case had been allowed to remain in the State court, appellant's primary right would have been clear upon establishing the facts set up in his bill to have the decree set aside for perjury of the defendants, whether on the trial or in the forming of the issues, and it is contended that this right was not lost to appellant upon identically the same state of facts in any Federal court to which his case might be removed on the decree considered, in any direct attack upon it, to set it aside on the grounds of fraud. The right to a removal to a Federal court is founded upon some supposed prejudice of the court or the people in which the suit is commenced, against a citizen of another state, which is made a party to the suit whereby a fair trial can not be ac-

corded such citizen. It was not adopted for the purpose of limiting the force and effect of judgments as determined by the court where the judgment was obtained, but it was for the purpose that, whatever the law was as to the force and effect of such judgments and decrees it should be fairly accorded to all the citizens of the several states.

X.

The argument of counsel at its close would seem to suggest that it would be a great hardship for the defendant who had formed his issue in equity by perjured answers should have his case reopened because if it were so opened, upon a recurrence of the same perjury, he might be subjected to the same penalty, and so go on *ad infinitum*. The best way to avoid this is for the party to abstain from perjury in forming his issue, especially in a case where he is required to answer truly, and for him not to do so is an imposition on the court as well as on his opponent.

At the close of appellee's brief counsel indulged in a little *naïveté* which almost provokes a smile. They say: "In this case Faurot asks for no execution founded upon "any judgment, or any decree; he asks no process from "any court; he has not, nor does he now, seek to em- "ploy the decree complained of to further any scheme "of his. *It is true* that it appears from the bill that he "has brought suit on *certain* promissory notes, a part of "the subject-matter of the former litigation, and that he "has replied *res adjudicata* to a plea of fraud, set up as "a defense to this suit."

When the court remembers that the appellant received at the inception of this fraud $15,000 in cash and property, and these "*certain* promissory notes," as part of

the consideration, amounting to $15,000 more, which now, with interest, exceeds some $30,000, and that appellee only asked that the decree founded on his perjured answer be used by him to defeat the fraud which obtained these notes, whereby he may pocket this large sum, the court will admire the moderation of his request, and though it may decline to aid him in this way to consummate a crime so cruel and unmitigated, that justice herself would rather break her sword than to use it to win such a victory.

The litigation to recover these $30,000 is now on. The repose of society is as much disturbed by allowing it to be prosecuted to judgment as to arrest its process and restrain the appellee from still pursuing the appellant.

ROBERT RAE,
Solicitor for Appellant.